88-1603

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. ____

In The

Supreme Court Of The United States

October Term 1988

NORTHERN PROPANE GAS COMPANY,
Petitioner

v.

H. FLOYD McGAHEE,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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March 17, 1989

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QUESTIONS PRESENTED

1. Do the federal antitrust laws require a firm with a large market share to refrain from selling below its average total cost plus a reasonable profit, and subject it to the risk that a trier of fact will infer "predatory intent" if the firm reduces prices to protect its market share and sells below average total cost, but above average variable cost?

2. In view of the ruling in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590 (1986), that the "prospects of attaining monopoly power [by predatory pricing] seem slight," is evidence of a large market share alone sufficient in a predatory pricing case to raise a triable issue of fact as to the existence of a "dangerous probability" of monopolization, where there are no barriers to entry, there has been a sharp decline in the defendant's market share at the hands of a new entrant during the period of alleged predation, and defendant does not have the power to raise prices in the market?

LIST OF PARTIES

Petitioner - Northern Propane Gas Company
Respondent - H. Floyd McGahee
Other firms, partnerships, or corporations that have an interest in the outcome of this case:
Enron Corp.
Belco Petroleum Corporation (Delaware)
- Belco Petroleum Corporation of Peru (Delaware)
- Belco Petroleum International, Ltd. (Delaware)
- Belco Petroleum Israel, Ltd. (Delaware)
- Belco Petroleum Latin America, S.A. (Delaware)
- Belcoal Inc. (Delaware)
- Sonneborn Associates Petroleum Corporation (Delaware)

Enron Americas, Inc. (Delaware)
- Enron Peru, Inc. (Delaware)

Enron Arctic Gas Company (Delaware)
Enron (The) Art Foundation (Nebraska)
Enron Coal Company (Delaware)
Enron Coal Pipeline Company (Delaware)
- Enron Bayou Co-Gen, Inc. (Texas)
- Enron Cogeneration One Company (Delaware)
- Enron Cogeneration Two Company (Delaware)
- Enron Cogeneration Three Company (Delaware)
- Enron Cogeneration Four Company (Delaware)
- Enron Cogeneration Five Company (Delaware)
- Enron Cogeneration Resources Company (Delaware)
- Enron Cogeneration Six Company (Delaware)

Enron Engineering International Co. (Delaware)
Enron Foundation - Houston (Texas)
Enron Foundation - Omaha (Nebraska)
Enron Gas Gathering, Inc. (Delaware)
Enron Gas Marketing, Inc. (Delaware)
Enron Gas Processing Company (Delaware)
Enron Gas Services Company
Enron Gas Supply Company
Enron Gas Transportation Company (Delaware)
Enron Helium Company (Delaware)

Enron Holdings, Inc. (Delaware)
Enron International Incorporated (Delaware)
Enron Canada Ltd. (Canada)
CGS Energy Inc. (Delaware)
Consolidated Natural Gas Ltd. (Canada)
Norlands Petroleum Limited (Alberta)
Enron Gas Canada Ltd.
Consoligas Management Limited (Canada)
Consolidated Pipe Lines Company (Own 44.6%) (Canada)
Enron Oil Corp. (Delaware)
Enron Oil Ltd. (Partnership) (London)
Enron Oil Private Ltd. (Singapore)
Enron Gas Liquids International, Ltd. (Delaware)
Enron Chemical International Division
Enron Chemical Orient Ltd. (Hong Kong)
Enron Gas Liquids International (U.K.), Ltd.
Enron Gas Liquids France S.A.R.L. (France)
(Formerly NLFI France S.A.R.L.)
IPI Orient, Ltd. (Hong Kong)
NLFI (Far East) Trading Private Limited
NLFI Products and Crude, Inc.
SatNorth (Own 50%)
InterNorth International Oil Incorporated, Ltd. (U.K.)
The Protane Corporation
Citadel Corporation Limited (Cayman Island)
Caribbean Applied Technology Centre
Citadel Venezolane S.A. (Venezuela)
Industrial Gas Limited
Manufacturero De Aparatos Domesticos, S.A. (Medosa)
Secoven Servicios Consolidados Ventane, S.A.
Industrial Gases Limited
Industrial Lacarda, S.A.
Industrias Ventane, S.A.
ProCaribe, Inc.
ProCaribe Division of The Protane Corporation
Progasco, Inc. (Puerto Rico)
Servicios Vengas, S.A.
Transporte Mil Ruedas, S.A.

Vengas De Caracas
Vengas De Centro, S.A.
Vengas De Occidente, S.A.
Enron Liquids Marketing Company (Delaware)
Enron Liquids Pipeline Company (Delaware)
Enron Minerals Company (Delaware)
Enron Oil & Gas Company (Delaware)
Belco Petroleum North America, Inc. (Delaware)
Belco Petroleum Australia, Inc. (Delaware)
Belco Petroleum Ecuador, Inc. (Delaware)
Enron Exploration Company (Texas)
Enron Producing Company (Delaware)
HNG Fossil Fuels Company (Texas)
HNG Oil (Sumatra) Inc. (Texas)
IN Holdings, Inc. (Delaware)
Enron Oil Canada, Ltd. (Alberta, Canada)
Ocelot Oil Company (Delaware)
Southeastern Exploration Company (Florida)
Enron Oil Trading & Transportation Company (Delaware)
Enron Oil Trading & Transportation Canada Ltd. (Canada)
Falcoal, Inc. (Delaware)
J.E. Fowler Petroleum Products, Inc. (Louisiana)
Port Cordova, Inc. (Alabama)
Webster Transportation Company, Inc. (Louisiana)
Enron Overthrust Pipeline Company (Delaware)
Enron Trailblazer Pipeline Company (Delaware)
Houston Natural Gas Corporation (Texas)
The Bermuda Company (Texas)
Black Marlin Pipeline Company (Texas)
Coal Properties Corporation (Illinois)
Comanche Marketing, Inc. (Texas)
Continental Group Resources Company (Florida)
Cora Dock Corporation (Texas)
Enron Capital Corp. (Delaware)
Enron Clearing House Company (Texas)
Enron Co-Gen Fuels Company (Texas)
Enron Gas Pipeline Operating Company
Enron Holdings Corp. (Texas)

Enron Industrial Natural Gas Company (Texas)
Enron Interstate Pipeline Company (Delaware)
Enron Mojave, Inc. (Texas)
Enron Offshore Company (Texas)
Enron Resources, Inc. (Texas)
Enron Texoma Gas Company (Texas)
Florida Intrastate Pipeline Company (Florida)
Gulf Company Ltd. (Bermuda)
HNG Capital Corp. (Delaware)
HNG Cortez Pipeline Company (Delaware)
HNG Holdings Corp. (Texas)
HNG Oil Company (Delaware)
HNG Offshore Properties, Inc. (Delaware)
HNG Synfuels Company
Houston Pipe Line Company (Texas)
Intratex Gas Company (Texas)
Marcoal Inc. (W. Virginia)
Northern Natural Gas Supply Co.
Pacific Atlantic Marketing, Inc. (Texas)
Panhandle Gas Company (Texas)
Pott Industries Inc. (Missouri)
Caruthersville Shipyard Inc. (Delaware)
The Dixie Dredge Export Corporation (Missouri)
Paducah Marine Ways Incorporated (Delaware)
Sunniland Pipe Line Company, Inc. (Florida)
Transgulf Pipeline Company (Florida)
Transwestern Pipeline Company (Delaware)
Valley Pipe Lines, Inc. (Texas)
IDT Gas Supply Company
Katy-Waha Gas Marketing
KMC Associates, Incorporated
NGP Pipeline Company (Delaware)
Northern Intrastate Pipeline Company (Delaware)
Northern Natural Gas Supply Company (Delaware)
Northern Plains Natural Gas Company (Delaware)
AmNorth, Inc. (Nebraska)
Northern Border Pipeline Company (Delaware)
Northern Texas Intrastate Pipeline Company (Delaware)

Pathfinder Assurance Limited (Bermuda)
Seagull Shoreline System (A Texas Partnership composed of
Northern Intrastate Pipeline Company, HNG Offshore
Company and Seagull Transmission Company)

Joint Venture Companies:

Citrus Corp. (Delaware)
Sonat
HNG
Citrus Interstate Pipeline Company (Delaware)
Citrus Trading Corp. (Delaware)
Florida Gas Transmission Company (Delaware)
Florida Intrastate Pipeline Company (Florida)

Cogenron Inc. (Delaware)
Enron Cogeneration One Company
Long List of Investors

HT Gathering Company (Texas)
Tenngasco and HNG
Houston Natural Gas

Mojave Pipeline Operating Company (California)
HNG Mojave, Inc.
El Paso Mojave

Oasis Pipe Line Company (Delaware)
Houston Natural Gas Corporation
Dow Chemical Co.
Tenngasco

San Marco Pipeline Company (Colorado)
Houston Natural Gas Corporation
The Denver & Rio Grande Western Railroad Co.

The Standard Shale Products Company (Colorado)
Conoco - 70%

Houston Natural Gas Corporation

Zapata Gulf Marine Corporation (Delaware)
Pott Industries Inc.
Zapata Corporation
Halliburton Company

Sperry Products, Inc.
Aero Mechanism, Inc.
Automation Systems, Inc.
Refinery Engineering Limited
Southwest Steel Rolling Mills, Inc.
Spartan Aviation, Inc.
Vicopa S.p.A.
Vitro Corporation
Vitro Jean, Inc.
Vitro Tullahoma, Inc.
Vitro Engineering Corporation
Penn Central Federal Systems Company
Vitro Services Corporation
Penn Central Telecommunications Company
Engineering and Technical Services, Inc.
Sprague Electric Company
International Field-Effect Transistor Corporation
Northern Berkshire Manufacturing Co., Inc.
Sprague Asia, Ltd.
Sprague Electric Pte. Ltd.
Sprague Aviation Company
Sprague Electric of Canada Limited
Sprague Electric (U.K.), Limited
Sprague Europe, Ltd.
Sprague Hong Kong Limited
Sprague Japan K.K.
Sprague Philippines, Inc.
Sprague Sales Canada Ltd.
Sprague Taiwan Corporation
Sprague World Trade Corporation
Sprague Electromag Belgium N.V.

Sprague Electric Coordination Center N.V.
Sprague Elekronik GmbH
Sprague France S.A.R.L.
Sprague Europe G.I.E.
Sprague Scandinavia A.B.
Tecnomil Ltd.
Telsta Network Services, Inc.
Tri-State Utility, Inc.
Ceat General de Colombia S.A. (2)
Electrofinance Limited (3)
Forest Ltda. Fabrica de Condutores Eletricos
Industria Venezolana de Cables Electricos C.A. (4)
General Cable Compania S.A. (3)
Cables de Comunicaciones, S.A. (5)
Plasmica S.A. (6)
Saenger S.A. (6)
Depositos y Servicios-Bilbao S.A.
Depositos y Servicios-Madrid S.A.
Depositos y Servicios S.A.

Ferrell Companies, Inc. (Kansas)
Ferrellgas, Inc. (Nebraska)
Ferrellgas, Inc. (Delaware)
Ferrell Petroleum, Inc. (Texas)
Indian Wells Oil Company (Missouri)
Indian Wells Production Co. (Missouri)
Ferrell Leasing Corp. (Missouri)
One Liberty Plaza, Inc. (Missouri)
One Liberty Plaza Real Estate, Inc. (Missouri)
Liberty Plaza Real Estate Services, Inc. (Missouri)
Ferrell Securities, Inc. (Missouri)
Ferrell Development Co. (Missouri)

Penn Central Energy Group, Inc.:
Buckeye Management Company
Buckeye Pipe Line Company
GK Technologies, Incorporated
Canadian Puregas Equipment, Limited

General Cable Corporation
General Cable Holdings, Inc.
General Cable International, Inc.
General Cable Export Corp.
General Cable International Operations Limited
GK Export Corp.
General Cable Overseas N.V.
GK Technologies of Canada Ltd.
Gencab of Canada Limited
GK Trucking Corp.
Indiana Steel & Wire Company
Network Distribution Services, Inc.
PCC Technical Industries, Inc.
Automation Industries GmbH
Automation International S.A.R.L.
California Electric Construction Co.
Canadian Sperry Products/Rail Limited
Conam Services, Inc.
G&H Technology, Inc.
Carrot Components Corp. (1)
Hydrotherm, Inc.
Installation Maintenance Services, Inc.
Nuclear Energy Services, Inc.
Pacific Maintenance Corporation
Facilities Management Corporation
Penn Central (Holdings) Pty. Ltd.
Penn Central (Australia) Pty. Ltd.
Penn Central Pty. Ltd.
GKT (Telecommunications) No. 1 Pty. Ltd.
Penn Central Technical Security Company
Qualcorp, Inc.
Cleveland Technical Center, Inc.
Great Southwest Corporation
GSC Development Corporation
Leadership Mortgage Investment Company
World Houston, Inc.
Gulf Energy Holding, Inc.
Gulf Energy Development Corporation

- Gulf Energy Compression Company
- Gulf Energy Gathering & Processing Corporation
- Gulf Energy Marketing Company
- Intrastate Gathering Corporation
- Valley Gas Transmission, Inc.

Holden Energy Corporation (77% owned)

- Holden Rig Company
  - Butler-Johnson, Inc.
  - Cubb Drilling, Inc.
  - Western Oil Well Service Co.
  - Willis Drilling Co., Inc.
- Holden Service Company
  - American Energy Tubulars Company
  - Delta Production Services Company
  - Holland-Vacco, Inc.
- Southern Crude Corp.

Marathon Manufacturing Companies, Inc.

- Diversified Contractors, Inc.
- Kelven, Inc.
  - Pearl River Development Corporation
- LeTourneau Offshore, Inc.
- Marathon Battery Company
- Marathon Flite-Tronics Company
- Marathon Leasing Company
- Marathon LeTourneau Company
  - Marathon LeTourneau Sales & Service Company
- Marathon LeTourneau Offshore Company
  - Marathon LeTourneau Offshore Pte. Ltd.
- Marathon Manufacturing Company
- Marathon Power Technologies Company
- Marathon Steel Company
- R. G. LeTourneau, Inc.

MCM Manufacturing Corporation

PCC 245 Leasing Corporation

Putnam Holdings, Inc.

- Putnam Sub, Inc.

Solid State Scientific, Inc.

- Solid State Scientif International, Inc.

PCC CHICAGO REALTY CORP.
PCC FORDHAM REALTY CORP.
PCC GUN HILL REALTY CORP.
PCC IRVINGTON REALTY CORP.
PCC REAL ESTATE, INC.
    PCC Billboard Realty Corp.
PCC SCARSDALE REALTY CORP.
PCC SUBSIDIARY, INC.
PCC TUCKAHOE REALTY CORP.

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v.

H. FLOYD McGAHEE,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The petitioner, Northern Propane Gas Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on October 27, 1988, rehearing of which was denied on December 20, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 858 F.2d 1487, and is reprinted in the Appendix A, *infra*.

The opinion of the United States District Court for the Northern District of Georgia is reported at 658 F. Supp. 189, and is reprinted in the Appendix B, *infra*.

JURISDICTION

This action alleging violation of § 2 of the Sherman Act, 15 U.S.C. § 2, and § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), was brought in the United States District Court for the Northern District of Georgia on November 30, 1983. Subject matter jurisdiction was based on 15 U.S.C. § 15(a).

On April 10, 1987, the district court granted defendant's motion for summary judgment. See Appendix B, *infra*.

On October 27, 1988, the Eleventh Circuit entered a judgment (Appendix C, *infra*) and opinion (Appendix A, *infra*) reversing the district court's order granting summary judgment.

On November 16, 1988, petitioner moved for rehearing, which motion was denied on December 20, 1988. Appendix D, *infra*.

Jurisdiction of the Supreme Court to review the judgment of the Eleventh Circuit exists under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to discriminate in price between different purchasers of

> commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

STATEMENT OF THE CASE

This case arises from a reversal by the Court of Appeals of a summary judgment rendered in favor of the petitioner, Northern Propane Gas Company, in a § 2 case brought by a former employee turned competitor alleging that Northern had attempted to monopolize the sale of propane gas in two rural Georgia counties by selling below its average total cost.

The relevant facts are summarized in the opinion of the Court of Appeals, as follows:

> McGahee and Northern Propane are retail distributors of propane, a fuel used for heating. Retail distributors primarily have two types of customers: (1) residential and (2) commercial. Generally, distributors sell propane to commercial users at a lower price. Because propane is a fungible good, price is of prime importance in its unregulated market.
>
> At the time relevant to this action. Northern Propane operated 180 retail distribution outlets in twenty-five states. One of these retail distribution outlets was based in Camilla, Georgia. Northern Propane produces and buys propane in western states and comingles the propane with other companies' propane to transport it by pipeline to Georgia. The Northern Propane district office in Camilla then takes delivery of the propane at the pipeline terminal.

In a March 1982 internal report, Northern Propane described the propane market in the Camilla district (approximately Mitchell and Baker Counties). Northern Propane estimated it had sixty percent of the total propane market within the district.[1] Northern Propane estimated Petrolane had twenty percent of the market, but regarded Petrolane as competition only for large volume commercial accounts. Northern Propane also estimated that five competitors, working within the edges of the district, split the remaining twenty percent. Because transportation costs restrict economical delivery of propane to a twenty-five to thirty mile radius from the storage tanks and because these five competitors were based outside of the Camilla district, these competitors were only competitive with Northern Propane on the edge of the Camilla district to which they were closest. In addition, Northern Propane stated that, of other possible fuels, only 'free' wood posed a competitive threat to propane in the Camilla district and that conversion to wood had stabilized.

When Northern Propane bought the retail distribution outlet in Camilla, Floyd McGahee was its district manager. McGahee had become a fixture in the Camilla area, having worked at the same propane outlet for approximately thirty years. In June 1981, Northern Propane demoted McGahee to a salesperson position

---

[1] Although Northern Propane had a large market share while McGahee was its general manager, its profit margin in the Camilla district was very low, and Northern's sales volume was declining. Thus, Northern's total profit in Camilla was under $1,300 in 1980, and only $62,400 in 1981, on total sales of 2.74 million gallons of propane. Ingram Aff. Ex. D-30. McGahee testified that despite Northern's large market share in Mitchell and Baker Counties, Northern did not have the power to raise propane prices unilaterally, but, to the contrary, had been forced to cut prices to agricultural customers during the period that McGahee managed the Camilla district, in order to meet lower prices offered by Petrolane, a regional distributor that also had a distribution facility in Camilla. McGahee Dep. at 48-49.

because, according to Northern Propane, he failed to keep adequate records, to keep the accounts receivable current, and to follow company directives. McGahee resigned from Northern Propane on October 9, 1981, under contentious circumstances.

After resigning from Northern Propane, McGahee obtained an $800,000 Small Business Administration (SBA) loan to finance his April 1982 entry into the propane business in the Camilla area. By February 1982, Northern Propane had obtained a copy of McGahee's SBA loan documents and other documents related to his financial position.[2] Before McGahee's distributorship opened, a Northern Propane internal report stated that its new "district manager has taken the offensive and will fight the former employee for the market." At the end of March 1982, Northern Propane lowered its residential prices five cents per gallon and its commercial prices four cents per gallon.[3]

In late April 1982, McGahee opened for business. Not only did McGahee solicit Northern Propane's customers, he also hired three of Northern Propane's drivers and repairmen. McGahee's market share went from zero percent in 1981 to twenty-three percent in 1983, while Northern Propane's market share dropped from sixty or sixty-five percent in 1981 to thirty-five percent in 1983. McGahee's success in acquiring a substantial share of the market was due both to his personal familiarity with the local community and to his willingness to compete with Northern Propane's prices. The direct head-to-head competition led to hard feelings, with Northern Propane's new district manager in Camilla referring to McGahee in internal documents as 'Floyd

---

[2] McGahee's SBA loan application indicated that McGahee expected to acquire 50% of Northern Propane's accounts.

[3] Northern's price reduction passed through to its customers 5¢ of a 14¢ reduction in Northern's cost of propane gas. McDaniel Aff. ¶ 12.

> The S.O.B.' and setting '[c]ontribute to Floyd's financial problems' as a district goal for 1983.
>
> During the price war, Northern Propane sold propane at prices below its average total cost. McGahee also contends that Northern Propane's own documents indicate that in some months Northern Propane sold propane to commercial customers at prices below average variable cost and cited documents that support this contention. McGahee also contends that Northern Propane's own documents indicate that Northern Propane sold propane in the Camilla district at lower prices than in other districts and cites documents that support this contention. Furthermore, Northern Propane furnished propane tanks in the Camilla district rent free[4] while charging rent in other districts realizing that McGahee would be limited in the number of tanks he could offer rent free.
>
> 858 F.2d at 1491-92.

McGahee's complaint did not allege that McGahee Propane, or any of the other five retail distributors that also competed for sales in Mitchell and Baker Counties, had been driven from the market by Northern's price reductions, cash discounts, or free tank rental policies. The thrust of McGahee's complaint was that Northern Propane should have maintained its prices at the levels that prevailed before McGahee entered the market in competition with Northern, and that Northern should not have reduced its prices below its average total cost (plus a reasonable profit) when it began to lose customers and market share to McGahee. McGahee Aff. ¶¶ 31, 32. McGahee's complaint prayed for an injunction requiring Northern Propane to sell at a reasonable profit. Complaint.

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[4] Northern Propane had a policy of providing tanks rent free during the period that McGahee was its general manager. Northern discontinued this policy in an effort to cut costs. As a consequence, it suffered a substantial loss of customers who could obtain tanks rent free from other companies. Northern reinstituted the policy as a competitive measure after it began to lose substantial numbers of customers to McGahee. McGahee Aff. ¶ 24.

After completion of discovery, Northern moved for summary judgment on the ground that there was not sufficient evidence to support a finding in McGahee's favor as to either the specific intent or dangerous probability elements of his attempted monopolization claims. Solely for purposes of its motion for summary judgment, Northern assumed arguendo that Mitchell and Baker Counties were a relevant geographic market. Northern's motion for summary judgment was supported by the affidavits of three of its employees and the affidavit of Arthur Andersen & Co. The affidavits of Northern's employees attested to the fact that Northern's profit margins in the Camilla District were low before McGahee entered the market, and denied that Northern's price reductions and free tank rental policies were an attempt by Northern to monopolize the sale of propane or to intentionally inflict losses on McGahee. The affidavits explained that each price reduction had been made to further Northern's own legitimate business interests, and were essentially defensive steps taken by Northern to prevent the loss of its customer base to McGahee. These affidavits also established that Northern had excess capacity, and that all of Northern Propane's sales (even after deduction of maximum discounts) exceeded Northern's average variable costs. By reducing prices, Northern was able to retain customers that otherwise would have been lost to McGahee, to earn an incremental profit and make a positive contribution to payment of Northern's fixed costs, and reduce the size of the losses that Northern would otherwise have sustained if Northern had not reduced prices in response to the solicitation of its customers by McGahee. Wade Aff. ¶¶ 23, 25; McDaniel Aff. ¶ 21; Ingram Aff. ¶ 55.

Northern also retained Arthur Andersen & Co. to conduct a thorough study of Northern's costs and sales of propane and to verify that the prices of propane sold by Northern exceeded Northern's average variable costs and made a positive contribution to payment of its fixed costs and overhead. First, Second & Third Affidavits of Hugh Gower.

Although McGahee pointed to isolated documents that he asserted supported his claims that Northern's prices to a limited number of customers during a two-month period might have fallen

below its average variable costs,[5] McGahee offered no counter-affidavit to contradict the affidavits of Arthur Andersen & Co. and those of Northern Propane's employees that all of Northern Propane's sales of propane in Mitchell and Baker Counties were made at prices that exceeded Northern's average variable cost.

The District Court Ruling

The district court granted Northern Propane's motion for summary judgment. The district court ruled that it was the plaintiff's burden under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), to produce sufficient admissible evidence to justify a finding in its favor with respect to each essential element of his claims under § 2 in response to Northern's motion for summary judgment, and that Northern, by introducing affidavits that negated plaintiff's claims, had gone beyond what is required of a defendant under Rule 56.

It was undisputed that neither McGahee nor any other of the five distributors had been eliminated as competitors in the sale of propane in Mitchell and Baker Counties, and that there were no barriers to entry.

> As to market conditions, the record demonstrates that there were no significant entry barriers. . . . It is not difficult to obtain a license to sell propane, and the fuel is available to new firms. Certainly, the initial capital investment is not prohibitive. Plaintiff was able to obtain a Small Business Administration loan and quickly garner a large share of the market. This scenario, in itself, effectively rebuts plaintiff's contention that entry barriers existed. *See Adjusters Replace-A-Car*, 735 F.2d at 893-94. Furthermore, defendant has stated, without

[5] Prevailing case law requires that cost be computed on a defendant's entire product line, and not on isolated sales or sales in particular sizes. *See Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 314-15 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984).

> contradiction, that other former employees have successfully started their own propane sales businesses. To the extent customer loyalty or buyer preference is a factor, plaintiff had the edge. Given plaintiff's well-established ties to the community, he was able to win over many of defendant's customers. The record indicates that, even at a higher price, many propane users preferred to buy from plaintiff.
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> 658 F. Supp. at 195, Appendix B.

The district court rejected respondent's contention that sales below average total cost were sufficient to raise a material issue of fact as to "predatory" (or specific) intent to monopolize, and also rejected his argument that the jury should be allowed to resolve this issue "under traditional subjective notions of intent." 658 F. Supp. at 193, Appendix B.

The district court held that the test that determines whether a defendant's prices are "predatory" is an objective one, and requires proof that defendant sold below its average variable cost for a sustained period of time in order to raise a material issue of fact of predation. The district court followed the rulings of a majority of the circuits in adopting average variable cost as an objective standard of predation, and in refusing, in the absence of barriers to entry and sales below average variable cost, to submit the issue of predatory intent to a jury for a determination based on subjective evidence of intent.

The district court also found that the respondent had failed to demonstrate the existence of a triable issue of fact with respect to the second element of his attempt to monopolize claim — whether, assuming that Northern Propane's prices were "predatory," there was a "dangerous probability" that Northern would succeed in achieving monopoly power over the relevant market. Respondent admitted on deposition that even though Northern Propane had enjoyed a large market share when he was its general manager, Northern Propane had not been able to control the price of propane in Mitchell and Baker Counties, because of competition from other distributors, particularly Petrolane, who had forced Northern

Propane to reduce prices to agricultural customers. McGahee Dep. pp. 48-49. The district court found:

> There is no evidence that defendant has ever been able to obtain supracompetitive prices, and this prospect seems unlikely. While defendant controlled a large segment of the market, there were four significant market participants and two lesser lights. Any effort to charge inflated prices would likely have caused defendant to lose business to the other established firms. Even if price cuts could temporarily drive all competitors from the putative relevant market — Mitchell and Baker counties — they would return as soon as defendant raised its prices.
>
> Furthermore, plaintiff's rapid success in the market reveals that changing propane suppliers is simple. That fact coupled with relatively low start-up costs suggests that new sellers would enter the market even if defendant could drive its competitors out of business entirely.
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> 658 F. Supp. at 196.

The Ruling Of The Court Of Appeals

In reversing the district court, the Eleventh Circuit rejected the rulings of a majority of the circuits and held that a fact finder is allowed to infer specific intent to monopolize — or "predatory intent" — from evidence that the seller sold below its average total cost, even though the seller's prices may have exceeded its average variable costs. The Eleventh Circuit held that evidence that a defendant's prices fell below its average total cost, coupled with any evidence of hostility toward the plaintiff (subjective intent), is sufficient to raise a triable issue of specific intent to monopolize.

> *If a defendant's prices were below average total cost and above short run marginal cost, then there is circumstantial evidence of predatory intent.* An inference of predatory intent, however, may not rest solely on prices of this nature. To withstand judgment as a matter

> of law, a plaintiff must have other evidence, either objective or subjective, of predatory intent.
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> 858 F.2d at 1503 (emphasis supplied).

With respect to the second essential element of respondent's attempted monopolization claim, the Court of Appeals held that the undisputed fact that Northern Propane had a 60%-65% market share of the propane sold in Mitchell and Baker Counties before McGahee entered the market, was sufficient *standing alone* to raise a material issue of fact as to whether there was a "dangerous probability" that Northern's sales below cost would successfully drive out all competition, and thus secure for Northern Propane a monopoly over the sale of propane in the two-county area. 858 F.2d at 1506. The court refused to give any weight to the absence of barriers to entry, the sharp decline in Northern's market share from 65% to 35% following McGahee's entry, or to the consensus noted by this Court in *Matsushita*, 475 U.S. at 589, that predatory pricing schemes are "rarely tried, and even more rarely successful."

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal antitrust law as to which the decisions of the circuits are in conflict, and which has not been but should be decided by this Court:

> What measure of cost is to be used in distinguishing price reductions that are procompetitive from those that are predatory?

This Court expressly refrained from deciding this issue in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117-18 n.12 (1986) ("Most commentators reserve the term predatory pricing for pricing below some measure of cost, although they differ on the appropriate measure [citations omitted]. No consensus has yet been reached on the proper definition of predatory pricing in the antitrust context, however."), and in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-85 nn.8&9 (1986) ("There is a good deal of debate, both in the cases and in the law reviews about which 'cost' is relevant in such cases. We need not resolve

this debate here . . . " (n.8); "We do not consider whether recovery should *ever* be available on a [predatory pricing] theory . . . when the pricing is above some measure of incremental cost. *See generally* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697, 709-18 (1975)." (n.9)).

I. The Decisions Of The Circuits Are In Conflict As To The Proper Definition Of Cost In Predatory Pricing Cases

This Court has recently recognized that the decisions of the circuits are in conflict as to the proper definition of cost in predatory pricing cases. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117-18 n.12 (1986).

> No consensus has yet been reached on the proper definition of predatory pricing in the antitrust context, however . . . . Definitions of predatory pricing also vary among the Circuits. Compare *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056-57 (CA 6) (pricing below marginal or average variable cost presumptively illegal, pricing above such cost presumptively legal), cert. denied, 469 U.S. 1036 (1984), with *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377 (CA 9) (pricing above average total costs may be deemed predatory upon showing of predatory intent), cert. denied, 464 U.S. 955 (1983).

479 U.S. at 117-18 n.12.

In this case, the Eleventh Circuit held that sales below average total cost are evidence of predatory intent. This ruling is in direct conflict with the following decisions from other courts of appeals that have held that sales above average variable cost are not evidence of predatory intent, but, on the contrary, raise either a rebuttable or a conclusive presumption that the prices were procompetitive.

Second Circuit: Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 88 (2d Cir. 1981) ("We agree with Areeda and Turner that in the general case at least, the relationship between

a firm's prices and its marginal costs provides the best single determinant of predatory pricing. Thus, prices below reasonably anticipated marginal cost will be deemed predatory, while prices above reasonable anticipated marginal cost will be presumed non-predatory"), *cert. denied*, 455 U.S. 943 (1982).

Third Circuit: O. Hommel Co. v. Ferro, 659 F.2d 340, 352 (3d Cir. 1981) (dictum: "While we are inclined to accept the basic premise of the Areeda and Turner thesis that predatory intent may not be inferred from sales at or above average variable cost . . . we need not [decide the issue here]."), *cert. denied*, 455 U.S. 1017 (1982).

Fifth Circuit: Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884, 891 (5th Cir. 1984) ("[T]he law of this circuit is that where barriers to entry are not pronounced predatory pricing is not established unless defendant has set his price below his average variable cost."), *cert. denied*, 469 U.S. 1160 (1985); *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir. 1984) ("Generally, in order to prove that defendant has sacrificed present revenues, it is necessary to establish that the defendant's prices were below marginal or average variable cost."), *cert. denied*, 469 U.S. 833 (1984); *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Sixth Circuit: D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431 (6th Cir. 1983) (sales above average variable cost presumed to be lawful), *cert. denied*, 467 U.S. 1242 (1984); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056-57 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (same); *cf. Morristown Block & Concrete Products Co. v. General Shale Products Co.*, 1987-2 Trade Cas. (CCH) ¶ 67,713 (6th Cir. 1987, unpubl.) (affirming summary judgment for defendant in a predatory pricing case).

Eighth Circuit: Henry v. Chloride, Inc., 809 F.2d 1334, 1346 (8th Cir. 1987) (We "hold AVC to be a marker of rebuttable presumptions, with the plaintiff holding the burden above and the defendant below"); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981) ("Pricing below 'fully-allocated costs'

but above average variable costs 'is not per se predatory; to the contrary, such pricing has been considered "the competitive and socially optimal result" of § 2 enforcement.' ").

Ninth Circuit: Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1194 (9th Cir. 1984) (Affirming a j.n.o.v. for the defendant in a predatory pricing case brought by a former distributor on the ground that "[s]ince below average total cost pricing does not prove Airweld's claim [*i.e.*, is presumptively lawful], Airweld was required to offer additional proof of anticompetitive conduct."), *cert. denied*, 469 U.S. 1213 (1985); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031-36 (9th Cir.) ("If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing the defendant's pricing was predatory"), *cert. denied*, 459 U.S. 825 (1982)[6]; *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 742-43 (9th Cir. 1979) ("The boundaries of reasonable price competition have recently been defined in this circuit [citing *Hanson* and *Janich Bros.*]. The thrust of this analysis is that price reductions up to the point of marginal cost are consistent with competition on the merits . . . "); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977) ("Janich has not come forth with sufficient evidence to go to the jury on the contention that American sold gin and vodka below average variable cost . . ."), *cert. denied*, 439 U.S. 829 (1978); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976) (The plaintiff's failure to show that the defendant's prices were below its marginal or average

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[6] *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983), did not change the rule in *Inglis* that prices above average variable cost are subject to a rebuttable presumption that such prices are non-predatory. *Transamerica* held that in the Ninth Circuit sales above average total cost are not *conclusively* presumed to be lawful, but can still be shown to be "predatory" if "the plaintiff . . . prove[s] by clear and convincing evidence — *i.e.*, that it is highly probably true — that the defendant's pricing policy was predatory." 698 F.2d at 1388. The Eleventh Circuit's ruling below is in direct conflict with *Transamerica*, in that the Eleventh Circuit held that sales above average total cost will be conclusively presumed to be lawful in the Eleventh Circuit.

variable costs "was a failure as a matter of law to present a prima facie case under § 2."), *cert. denied*, 429 U.S. 1074 (1977).

Tenth Circuit: Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790, 797 (10th Cir.) (holding "prices below total cost [and above average variable cost to be] . . . consistent with the competitive goals" and reversing verdict in favor of plaintiff.), *cert. denied*, 434 U.S. 879 (1977).

II. The Ruling Below Also Conflicts With Decisions Of This Court

By allowing the trier of fact to infer predatory intent from sales below average total cost, the Eleventh Circuit has also disregarded well-established principles gleaned from decisions of this Court.

First, the decision threatens to penalize legitimate price competition by firms that cut prices as a means of increasing market share. In *Cargill*, however, this Court reasoned that even dominant firms have a right under the antitrust laws to make *offensive* price reductions aimed at increasing their market share — even though such increases necessarily will come at the expense of small competitors:

> *Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d

1050, 1057 (CA 6), *cert. denied*, 469 U. S. 1036 (1984).

479 U.S. at 116.

See also Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986).

The subjective test of predation endorsed by the Eleventh Circuit conflicts with the ruling in *Cargill* and threatens to discourage legitimate price competition by allowing juries to infer "predatory intent" whenever a dominant firm reduces prices and sells below its average total cost, even where such price reductions are, as in this case, *defensive* in nature to preserve its share of the market from erosion by a competitor or are in response to over-capacity. *See Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp., supra.*

Second, the ruling of the Eleventh Circuit disregards the substantive rule of antitrust law announced in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984), that limits the inferences a fact finder may draw from ambiguous business conduct. *Accord Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577-78, 597 n.21 (1986). To prevent the antitrust laws from being used to deter the procompetitive conduct those laws were intended to foster, the Court fashioned a rule of evidence in antitrust cases which prohibits a fact finder from inferring illegal purposes from ambiguous business conduct, *i.e.*, conduct as consistent with permissible competition as it is with predation. *See id.* at 597 n.21. Under the rule, ambiguous conduct is presumed to be lawful. To survive a motion for summary judgment, it is not enough that the evidence of business conduct is consistent with a finding of predatory intent; instead, the plaintiff must present "evidence that tends to exclude the possibility" that the conduct had a legitimate business purpose. *Monsanto*, 465 U.S. at 764.

In this case, however, none of the evidence on which the Eleventh Circuit relied to raise an inference of predatory intent tended to "exclude the possibility" of a legitimate business purpose for the price reductions. Indeed all of the evidence on which it relied was either procompetitive or ambiguous. Specifically, the Eleventh

Circuit held that a fact finder could infer predatory intent from such potentially procompetitive activity as keeping abreast of a competitor's financial status and adopting a free tank rental policy, plus "unfavorable" comments about the competitor. 858 F.2d at 1504, Appendix A.[7]

It is a rare case in which uncomplimentary statements about a competitor are not found in a litigant's files. Moreover, the number or vehemence of such references is likely to increase in direct proportion to the vigor of the legitimate competition between the two. For this reason most courts, contrary to the Eleventh Circuit, have held that such statements do not provide any meaningful evidence of predatory intent and are not enough to create a triable issue of fact of specific intent to monopolize. As the Seventh Circuit has said:

> So "intent to harm rivals" is not a useful standard in antitrust. *See also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983): "'[I]ntent to harm' [rivals] without more offers too vague a standard in a world where executives may think no further than 'Let's get more business,' and long-term effects on consumers depend in large measure on competitors' responses." Neither is "intent to do more business," which amounts to the same thing. Vigorous competitors intend to harm rivals, to do all the business if they can. To penalize this intent is to penalize competition. *See also* 7 Areeda, *Antitrust*, *supra* at ¶ 1506.
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> *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins. Co.*, 784 F.2d 1335, 1338-39 (7th Cir. 1986).

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[7] It was undisputed that Northern Propane obtained information on respondent's financial status in order to determine whether the funds from McGahee Family Farms, to whom McGahee had extended credit while employed by Northern and whose $60,000 account with Northern was delinquent, were being used to launch McGahee's competing business. Similarly, respondent himself admitted that the free tank rental policy was simply the reinstitution of a successful policy that Northern Propane had employed while respondent was still its general manager.

See also William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1028 (9th Cir. 1981) ("intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation"), *cert. denied*, 459 U.S. 825 (1982); Areeda, *Mergers and Markets A Century Past and Future*, 79 Cal.L. Rev. 959, 963 (1987).

In short, despite this Court's admonition in *Matsushita*, the Eleventh Circuit's decision permits a plaintiff to escape summary judgment on the basis of ambiguous evidence that does *not* tend to exclude the possibility of a legitimate business purpose for the price reductions. In so holding, the Eleventh Circuit's decision subverts the salutary purpose of the summary judgment procedure as articulated in *Celotex* and applied in *Matsushita*.

III. The Decision Below Presents An Important Federal Question That Has Not Been, But Should Be Decided By This Court.

In both *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117-18 n.12 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-85 nn.8&9 (1986) (quoted at pp. 11-12, *supra*), this Court expressly avoided the question of what measure of cost should be used to distinguish procompetitive from predatory price reductions. The question of the appropriate cost standard is an important question of federal antitrust law that has not been, but should be decided by this Court for three reasons.

First, this issue involves the most central and sensitive area of antitrust policy — namely, price competition. The ability of a competitor to reduce prices lawfully in order to preserve or increase market share — in short, to compete vigorously — addresses the core conduct that the antitrust laws are designed to promote.

Second, the consequences of either a mistaken standard or the mere absence of a clear standard are costly — namely, chilling legitimate price competition — and justify this Court's attention to the issue. This Court has expressed serious reservations as to whether "predatory pricing" is more than a theoretical business practice and whether, even if the practice exists, it presents a genuine threat to competition. The Court has noted that while there

is disagreement among "commentators . . . as to whether it is *ever* rational for a firm to engage" in predatory pricing (*Cargill*, 479 U.S. at 121 n.17), there is at least "a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589. In light of the uncertainty that surrounds predatory pricing, the Court should take this opportunity to adopt a clear and objective cost standard that avoids chilling lawful price competition.

> [C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto*, *supra*, at 763-64. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (CA 1 1983).
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> *Matsushita*, *supra*, 475 U.S. at 594.

By permitting a jury to draw a negative inference (predatory intent) from a fact (sales above average variable cost) that in the overwhelming majority of cases represents procompetitive conduct, the Eleventh Circuit's ruling presents just such a threat.

Professors Areeda and Turner have persuasively demonstrated that it is both rational and procompetitive for a business to sell its goods below its average total cost in most, if not all, circumstances. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); Easterbrook, *Predatory Strategies and Counter-Strategies*, 48 U. Chi. L. Rev. 263, 268 (1981); Koller, *The Myth of Predatory Pricing — An Empirical Study*, 4 Antitrust Law & Econ. Rev. 105 (1971).

Moreover, many courts of appeals have endorsed sales above average variable costs but below average total cost as economically desirable because they both promote efficiency by utilizing excess capacity, and benefit consumers by offering lower prices. For

example, in *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), the Fifth Circuit explained:

> According to Areeda and Turner, a firm is always acting reasonably if it charges a price for its output that enables it to recover at least the average variable costs, because at that price the company is recovering the costs associated with producing each individual unit of output. The firm will, of course, prefer to recover its average total cost, but if it is unable to do so it will minimize its losses if it produces those units of output for which it can recover at least its variable costs. This is so because, in the short run at least, a firm cannot escape paying its fixed costs even if it reduces its production to zero.
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> 735 F.2d at 889.

See also California Computer Products, Inc. v. IBM Corp., 613 F.2d 727, 743 (9th Cir. 1979); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 857 (9th Cir. 1977).

Indeed, the ability to reduce prices and sell below average total cost may be essential to the survival of a firm with excess capacity. *See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., supra*, at 1035 ("Prices below the average total cost of production, but above the average variable cost . . . [are] a legitimate means of minimizing losses during the period of inadequate demand."). As the Tenth Circuit has recognized, "[t]he common circumstance in which sales below total cost may be expected is that of excess capacity." *Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 796 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). Excess capacity permits a business to produce additional units at an incremental cost that is lower than the average total cost of previous units. If such a business is allowed to reduce prices and sell below its average total cost, but above its average variable cost, it can attract additional sales that will expand its output, utilize its excess capacity, generate an incremental profit for itself, and confer a benefit on its customers in the form of lower prices. In such circumstances, it "may even be desirable and certainly could not be considered 'sinister' " for the seller to reduce

prices, even if the price reduction results in the elimination of a competitor, because it allows the seller to operate more efficiently by utilizing his capacity and benefits the consumer through lower per unit prices. *Id.* In fact, as the Tenth Circuit acknowledges, sales below average total cost may be the only alternative to harmful oligopoly conduct for the business with excess capacity. *Id.* The risk that a jury will be able to infer predatory intent from this conduct, however, may chill this seller's conduct and leave society not only with idle and misallocated plant capacity, but consumers will be required to pay higher unit costs than necessary. *See id.* By allowing juries to make a subjective determination of predatory intent based on sales above average variable cost, the Eleventh Circuit has created a serious risk of penalizing procompetitive conduct that is essential to the proper functioning of a free market system.

Moreover, the mere uncertainty over whether a fact finder will be permitted to find this conduct predatory will deter much procompetitive price competition. Businesses need a clear, bright-line standard to govern their conduct in this critical area of antitrust policy.

Finally, the substantive rule announced by the Eleventh Circuit amounts to a legal mandate that businesses must sell at a profit, and creates a legal standard with which it is impossible for many businesses to comply. By ruling that sales below average total cost are evidence of predatory intent, the Eleventh Circuit rule would require a business to *raise* its prices whenever its sales volume declines to a break-even point at existing price levels, in order to escape an inference of predatory intent. For example, as Northern's sales volume began to decline as a result of the competitive activities of McGahee, this decline in volume caused a corresponding *increase* in Northern's average fixed costs and, therefore, in its average *total* costs per gallon of sales. To comply with the above-total-cost standard adopted by the Eleventh Circuit, Northern Propane would have been required to *raise* its prices as its sales volume was declining to the break-even point in order to avoid an inference of predatory intent.

In short, the above-total-cost standard not only would prohibit a seller in this circumstance from responding with price competition of its own, but would affirmatively require the seller to *raise* its prices to avoid an inference of predatory intent. As the Ninth Circuit said in *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 742 (9th Cir. 1979), however, " 'the antitrust laws do not require a business to cut its own throat' " (quoting *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653, 657 (1st Cir. 1961)). *See also Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1194 (9th Cir. 1984) (to hold a defendant's price reduction to be an unfair means of competition simply because its competitors engaged in only limited price competition " 'would support the perverse rationale that a defendant may not compete by lowering its prices "if competition would injure its competitors" ' ") (citations omitted), *cert. denied*, 469 U.S. 1213 (1985). The Eleventh Circuit's perverse interpretation of the antitrust laws merits this Court's review.

IV. The Eleventh Circuit's Ruling On The Dangerous Probability Issue Conflicts With This Court's Decisions In *Matsushita* And *Cargill* And With The Decisions Of Other Circuits.

The Eleventh Circuit held that evidence that petitioner had a beginning market share of 65% of the propane sold in the two-county area was sufficient standing alone to raise a triable issue of fact as to the "dangerous probability of success," which is the second essential element of respondent's claims under § 2. 858 F.2d at 1506. The court did not, however, take issue with the district court's finding that there were no barriers to entry into the retail propane gas market in southwest Georgia.

The Eleventh Circuit's ruling on the dangerous probability issue is in conflict in a number of respects with both the decisions of this Court and the decisions of other circuits.

A. *Conflict With Matsushita And Cargill*

The Eleventh Circuit's dangerous probability ruling conflicts with this Court's decision in *Matsushita, supra*, in two respects. *First, Matsushita* clearly holds that barriers to entry are essential to a

successful predatory pricing claim, yet the Eleventh Circuit found a triable issue of dangerous probability of monopolization in the absence of any barriers to entry.

Among the reasons cited by this Court in *Matsushita* for finding that Zenith's claims of predatory pricing were "implausible," made "no economic sense" (475 U.S. at 587), and should have been disposed of on summary judgment, was the absence of evidence of barriers to entry to the business of manufacturing consumer electronics. 475 U.S. at 591 n.15. The Court explained that the success of any predatory pricing scheme depends not only on keeping prices low enough long enough that all competitors are driven from the market, but "on *maintaining* monopoly power for long enough [after all competitors are driven from the market] both to recoup the predator's losses and harvest some additional gains," before new competition can enter the market and force the predator's prices back to competitive levels. 475 U.S. at 589-91. The Court held that *barriers to entry by new competition* are, therefore, essential to the success of any predatory pricing scheme because "without barriers to entry, it would presumably be *impossible* to maintain supracompetitive prices for an extended time." 475 U.S. at 59 n.15.

Second, the Eleventh Circuit's ruling is also inconsistent with this Court's finding in *Matsushita* that "there is a consensus among commentators that predatory pricing schemes are rarely tried and even more rarely successful." 475 U.S. at 589. More specifically, in *Matsushita*, the Court ruled that the "prospects of attaining monopoly power seem slight" (*id.* at 590) despite evidence that the Japanese manufacturers' "collective share rose rapidly during this period [of alleged predation] from one-fifth or less of the relevant market to close to 50%." 475 U.S. at 591. If, as *Matsushita* held, there was only a "slight" chance that the Japanese, whose market share was rising rapidly, could successfully monopolize the consumer electronics market, no rational fact finder could find that there was a "dangerous probability" that Northern Propane — whose market share fell from 60% to 35% in less than two years — could monopolize the sale of propane in Mitchell and Baker Counties. In short, *Matsushita's* holding demonstrates that this is

not one of the very rare cases in which a claim of predatory pricing should go to a jury.

In finding a triable issue of dangerous probability of monopolization based on Northern Propane's 65% market share prior to McGahee's entry into the market, the Eleventh Circuit further ignored this Court's directive in *Cargill, supra*, that focus is not on market share *before* the alleged predatory pricing, but on market share and barriers to entry that are likely to exist *after* competitors have been driven from the market and predatory pricing has ended. In *Cargill* this Court not only reiterated that barriers to entry are essential to any predatory pricing claim, but stressed that:

> [I]n evaluating entry barriers in the context of a predatory pricing claim . . . a court should focus on whether significant entry barriers would exist after . . . [the] elimination of rivals, because . . . that [is the] point . . . [at which defendant] would begin to charge supra-competitive prices, and the barriers that existed during competitive conditions might well prove insignificant.
>
> 479 U.S. at 120 n.15.

Disregarding the relevant time period for assessing market share, the Eleventh Circuit held as follows:

> When determining whether an issue of fact exists as to whether defendant's actions presented a dangerous probability of defendant achieving a monopolist's market power, a court examines the relevant market and defendant's market power *before* the attempt to monopolize began.
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> 858 F.2d at 1505 (emphasis supplied).

B. *Conflict With Decisions Of Other Circuits*

The Eleventh Circuit's holding on dangerous probability raises two other points of conflict with the decisions of other circuits: (1) in concluding that initial market share alone is sufficient to create an inference of dangerous probability without regard to other economic factors which negate the existence of market power, and (2) in ignoring evidence of a significant decline in the defendant's market

share, which other circuits have held sufficient to negate a finding of dangerous probability.

The ruling of the Eleventh Circuit that dangerous probability can be inferred from initial market share alone conflicts directly with the decisions of the Seventh Circuit in *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989), and *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986).

In *Ball Memorial* Judge Easterbrook explained that market *share* does *not* indicate that a firm has market *power*, unless the firm "controls a significant percentage of the productive assets in the market" and there are also significant entry barriers so that a firm can "cut back the market's total output and so raise price." 784 F.2d at 1335. "To put these points a little differently, the lower the barriers to entry, and the shorter the lag of new entry, the less power existing firms have. When the supply is highly elastic, existing market share does not signify power." *Id.*

The Seventh Circuit applied these principles again in *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989). In *Indiana Grocery*, the Seventh Circuit affirmed a summary judgment in an antitrust case that charged Kroger with having engaged in predatory pricing to monopolize the sale of groceries in Indianapolis and in two submarkets. For purposes of the motion for summary judgment, Kroger conceded Indiana Grocery's allegations that Indianapolis was a relevant market, and that its share of the entire Indianapolis market and of two submarkets had increased to 35% and 50%, respectively. Kroger also "did not challenge, for purposes of the motion, Indiana Grocery's allegation that Kroger's revenues fell below its *average variable costs* in some submarkets during certain periods." 864 F.2d at 1414 (emphasis added). Despite a stipulation that the barriers to entry in the retail grocery business were high, it was undisputed that Kroger could never control the supply of groceries to the Indianapolis market.[8]

[8] Like Kroger, Northern Propane could not control the supply of propane gas into Mitchell and Baker Counties. Northern, McGahee, and other retail

The Seventh Circuit affirmed the entry of summary judgment in Kroger's favor, reasoning that no reasonable trier of facts could find that there was a "dangerous probability" that Kroger could monopolize the sale of groceries in Indianapolis if it could not control the supply. According to the Seventh Circuit, Kroger's concession that it had sales below average variable cost, and that its share of the markets had increased to 35% and 50%, were *not* enough to raise a triable issue that there was a "dangerous probability" that Kroger would succeed in monopolizing even the submarkets.

> The output of the Indianapolis retail grocery market is, of course, groceries, and *Indiana Grocery concedes that Kroger could never control the supply of groceries to the Indianapolis retail market.* If so, it is very difficult to see how Kroger could ever restrict total market output and thereby raise prices.
>
> As if this is an unimportant concession, Indiana Grocery argues that Kroger's alleged predatory pricing scheme nevertheless created a dangerous probability of monopoly power because Kroger's market share of grocery sales during the alleged predation period rose to 35 percent in the Indianapolis area as a whole and to nearly 50 percent in two submarkets. But while market share may indicate market power in certain cases, the two are not necessarily the same. Market share indicates market power only when sales reflect control of the productive assets in the business, for only then does it reflect an ability to curtail total market output. *Ball Memorial*, 784 F.2d at 1335. If a firm's share of market sales does not reflect control of a significant percentage of the market's productive assets, it does not indicate market power.
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> 864 F.2d at 1414 (emphasis in original).

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distributors purchased their requirements from wholesalers and took delivery at the Colonial Pipeline terminal in Albany, Georgia.

Finally, the Eleventh Circuit's total disregard of Northern Propane's drastic decline in market share from 65% to 35% after McGahee's entry into the market is inconsistent with the holdings of a majority of the circuits. Most courts of appeals have held that evidence of a significant decline in the defendant's market share is sufficient to negate the "dangerous probability" element of a § 2 case. *See, e.g., Indiana Grocery, Inc. v. Super Valu Stores, Inc., supra,* (In assessing "dangerous probability," the Court said that "we cannot help but notice that Cub Stores were able to enter the Indianapolis market and control a substantial share of area grocery sales in a short period of time); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., supra,* at 1330; *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982) ("During the relevant period, Hilltop's market share declined from approximately 40% to approximately 30%. Given the facts of the case, such a share is not sufficient to establish Hilltop's capacity to monopolize . . . The fact that Hilltop's share of the market was declining also belies whatever inference of capacity to monopolize that may be drawn from the size of its market share"); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) ("No reasonable jury could conclude from the rapid and continuing decline of Pet's market share, which reached a high point of 54.5% in March 1969 and fell to 33% by 1974, that there was a probability that Pet would monopolize the waffle market, let alone a dangerous probability.").

The Eleventh Circuit's ruling that the size of Northern Propane's market share in the period before McGahee entered the market was alone sufficient to raise a triable issue of fact of dangerous probability of success — without regard to the absence of barriers to entry, the absence of any control by Northern over either the prices or the supply of propane, and the drastic decline in Northern's market share at the hands of McGahee — is in direct conflict with the above decisions and merits the issuance of a writ of *certiorari.*

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit in this case.

Respectfully submitted,

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March 17, 1989

Appendix A

H. Floyd McGAHEE,
Plaintiff-Appellant,

v.

NORTHERN PROPANE GAS COMPANY,
Defendant-Appellee.

No. 87-8379.

United States Court of Appeals,
Eleventh Circuit

Oct. 27, 1988.

Appeal from the United States District Court for the Northern District of Georgia.

Before HATCHETT and EDMONDSON, Circuit Judges, and LYNNE*, District Judge.

LYNNE, Senior District Judge:

Plaintiff-appellant H. Floyd McGahee (McGahee) brought this antitrust action under Section 2 of the Sherman Act, 15 U.S.C. § 2, and under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), against defendant-appellee Northern Propane Gas Company (Northern Propane). The district court granted Northern Propane's motion for summary judgment and entered judgment against McGahee. *McGahee v. Northern Propane Gas Co.*, 658 F.Supp. 189 (N.D.Ga.1987) (Shoob, J.). We reverse.

I. FACTS

McGahee and Northern Propane are retail distributors of propane, a fuel used for heating. Retail distributors primarily have two types of customers: (1) residential and (2) commercial. Generally, distributors sell propane to commercial users at a lower

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* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

price. Because propane is a fungible good, price is of prime importance in its unregulated market.

At the time relevant to this action, Northern Propane operated 180 retail distribution outlets in twenty-five states. One of these retail distribution outlets was based in Camilla, Georgia. Northern Propane produces and buys propane in western states and commingles the propane with other companies' propane to transport it by pipeline to Georgia. The Northern Propane district office in Camilla then takes delivery of the propane at the pipeline terminal.

In a March 1982 internal report, Northern Propane described the propane market in the Camilla district (approximately Mitchell and Baker Counties). Northern Propane estimated it had sixty percent of the total propane market within the district. Northern Propane estimated Petrolane had twenty percent of the market, but regarded Petrolane as competition only for large volume commercial accounts. Northern Propane also estimated that five competitors, working within the edges of the district, split the remaining twenty percent. Because transportation costs restrict economical delivery of propane to a twenty-five to thirty mile radius from the storage tanks and because these five competitors were based outside of the Camilla district, these competitors were only competitive with Northern Propane on the edge of the Camilla district to which they were closest. In addition, Northern Propane stated that, of other possible fuels, only "free" wood posed a competitive threat to propane in the Camilla district and that conversion to wood had stabilized.[1]

When Northern Propane bought the retail distribution outlet in Camilla, Floyd McGahee was its district manager. McGahee had

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[1] For the purpose of this summary judgment motion, Northern Propane accepted that the relevant geographic market is Mitchell and Baker Counties in southwest Georgia and that the relevant product market is propane. The district court suggested that it had difficulties with this definition of the relevant markets. *McGahee*, 658 F.Supp. at 192 n. 3. The Northern Propane internal report discussing the markets does support this definition of the relevant markets. *See* Plaintiff's Exhibit 87, p. IN01029. *Cf. Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 364-66 (9th Cir.1988) (holding market definition to be jury issue in case with similar facts).

become a fixture in the Camilla area, having worked at the same propane outlet for approximately thirty years. In June 1981, Northern Propane demoted McGahee to a salesperson position because, according to Northern Propane, he failed to keep adequate records, to keep the accounts receivable current, and to follow company directives. McGahee resigned from Northern Propane on October 9, 1981, under contentious circumstances.[2]

After resigning from Northern Propane, McGahee obtained an $800,000 Small Business Administration (SBA) loan to finance his April 1982 entry into the propane business in the Camilla area. By February 1982, Northern Propane had obtained a copy of McGahee's SBA loan documents and other documents related to his financial position. Before McGahee's distributorship opened, a Northern Propane internal report stated that its new "district manager has taken the offensive and will fight the former employee for the market." At the end of March 1982, Northern Propane lowered its residential prices five cents per gallon and its commercial prices four cents per gallon.[3]

In late April 1982, McGahee opened for business. Not only did McGahee solicit Northern Propane's customers, he also hired three of Northern Propane's drivers and repairmen. McGahee's market share went from zero percent in 1981 to twenty-three percent in 1983, while Northern Propane's market share dropped from sixty or sixty-five percent in 1981 to thirty-five percent in 1983.[4] McGahee's success in acquiring a substantial share of the market was due both to his personal familiarity with the local community

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[2] Northern Propane filed a counterclaim against McGahee alleging that he had breached his fiduciary duties while its employee by wrongfully extending credit to McGahee Family, Inc., a corporation in which McGahee had a financial interest. Northern Propane voluntarily dismissed the counterclaim on February 25, 1985.

[3] Plaintiff's Exhibit 5, *compare* p. C00333 *with* p. C00328.

[4] These percentages are based on McGahee's estimates during his deposition. Logically, two competitors engaging in a price war in which other competitors do not participate should increase their combined share of the market. These percentages indicate that Northern Propane's and McGahee's combined share of the market decreased despite their price war. This anomaly is not explained in the record.

and to his willingness to compete with Northern Propane's prices. The direct head-to-head competition led to hard feelings, with Northern Propane's new district manager in Camilla referring to McGahee in internal documents as "Floyd The S.O.B." and setting "[c]ontribute to Floyd's financial problems" as a district goal for 1983.

During the price war, Northern Propane sold propane at prices below its average total cost. McGahee also contends that Northern Propane's own documents indicate that in some months Northern Propane sold propane to commercial customers at prices below average variable cost and cited documents that support this contention.[5] McGahee also contends that Northern Propane's own documents indicate that Northern Propane sold propane in the Camilla district at lower prices than in other districts and cites documents that support this contention.[6] Furthermore, Northern Propane furnished propane tanks in the Camilla district rent free while charging rent in other districts, realizing that McGahee would be limited in the number of tanks he could offer rent free.[7]

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[5] Compare the prices in Plaintiff's Exhibit 15, p. C00907, Plaintiff's Exhibit 16, p. C00851, and Gower's First Affidavit, Exhibit D, p. 2, lines 10-13 to the average variable costs in Gower's First Affidavit, Exhibit C, p. 3, lines 26-28. Northern Propane calls McGahee's contention "a blatant misrepresentation of the record," but fails to explain why the documents do not support McGahee's contention, except to claim one of the three documents concerning prices had a typographical error that was corrected later by Gower's Third Affidavit. On the other hand, McGahee merely gives prices and costs and cites their sources without fully explaining these numbers.

[6] Northern Propane responds to this contention by calling it misleading and explains why, but does not support this explanation with evidence in the record. The district court assumes Northern Propane sold propane in the Camilla district at prices below those charged in other districts. *McGahee*, 658 F.Supp. at 197. In March 1982, Northern Propane's discount policy gave each individual district the option of offering, with regional office approval, cash discounts, class of customer discounts, and individual commercial customer discounts. Plaintiff's Exhibit 1, pp. C10001-C10005. Northern Propane's internal documents show that its Camilla district offered these discounts.

[7] Plaintiffs Exhibit 80, p. C00832.

II. STANDARD OF REVIEW

Our review of the district court's grant of summary judgment is plenary and is to be conducted utilizing the same legal standards as those imposed upon the district court. *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir.1985). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

[1, 2] Three recent Supreme Court cases vacating appellate reversals of district court orders granting summary judgment illuminate the appropriate role of summary procedure. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A common theme found in these cases is that

> [s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.R.Civ.P. 1.

Celotex, 106 S.Ct. at 2555. In *Matsushita*, the Supreme Court made clear that summary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition. 106 S.Ct. at 1360. For this reason, when opposing a motion for summary judgment, an antitrust plaintiff must present evidence that tends, when interpreted in a light most favorable to plaintiff, to exclude the possibility that defendant's

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McGahee also contends that Northern Propane attempted to hinder and harass him by not picking up its tanks when required by customers, refilling customers' tanks after being asked to disconnect them, and reporting McGahee to the State Fire Marshal for disconnecting Northern Propane's tanks. Unfortunately, the primary source McGahee cites to support these contentions of anticompetitive conduct is not part of the record on appeal; therefore, we do not consider them.

conduct was as consistent with permissible competition as with illegal conduct. *Id.* at 1357.[8]

III. THE TEST FOR PREDATORY PRICING

[3, 4] A plaintiff must show two elements to establish an attempted monopolization claim under Section 2 of the Sherman Act: (1) the specific intent on the part of the defendant to achieve a monopoly and (2) a dangerous probability the defendant would succeed. *Swift & Co. v. United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905); *Tiftarea Shopper, Inc. v. Georgia Shopper, Inc.*, 786 F.2d 1115, 1118 (11th Cir.1986). The first element can be satisfied by proof of predatory pricing, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986), which is what McGahee has alleged in this case. A problem arises, however, in determining whether a defendant has engaged in predatory pricing.

[5] A plaintiff who is a competing seller such as McGahee must show two elements to establish a Robinson-Patman Act claim: (1) the defendant, in the course of interstate commerce, discriminated in price between purchasers of commodities of like grade and quality and (2) a reasonable possibility that this price difference may harm competition. *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434–35, 103 S.Ct. 1282, 1288, 75 L.Ed.2d 174 (1983); *FTC v. Anheuser-Busch*, 363 U.S. 536, 549, 80 S.Ct. 1267, 1274, 4 L.Ed.2d 1385 (1960). Price discrimination, the first element, is merely a price difference. *Anheuser-Busch*, 363 U.S. at 549, 80 S.Ct. at 1274. Harm to competition, the second element, can be satisfied by proof of predatory pricing.[9] *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967). Again, the

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[8] Justification is not, however, an element of an antitrust plaintiff's prima facie case, but is an affirmative defense. 15 U.S.C. § 13(b) (Robinson-Patman Act); *e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (Sherman Act).

[9] The predatory pricing issues are the same for Sherman Act Claims as for Robinson-Patman Act claims. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853 n. 16 (5th Cir. Unit B), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981).

problem is determining whether a defendant has engaged in predatory pricing.

A. The District Court's Test for Predatory Pricing.

In its opinion, the district court discusses the economic theory behind regulating predatory pricing, relying primarily on the work of Professors Areeda and Turner, in its quest for a test for determining when a defendant has engaged in predatory pricing. *McGahee*, 658 F.Supp. at 192-93. Although the district court discusses the test from *International Air Industries v. American Excelsior Co.*, 517 F.2d 714 (5th Cir.1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976), the district court adopts a test proposed by Areeda and Turner, modifying the test slightly to make it consistent with *International Air*. *McGahee*, 658 F.Supp. at 192 n. 5. *Cf. Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (decisions rendered by the former Fifth Circuit before October 1, 1981, are binding upon courts of the Eleventh Circuit). According to the district court,

> [i]n *International Air*, the former Fifth Circuit accepted Areeda and Turner's basic premises but added a significant gloss. Specifically, the court formulated a different standard for markets in which entry barriers are extremely high. In such cases, a plaintiff can prevail by showing that the defendant is "charging a price below its short-run, profit-maximizing price . . . ." 517 F.2d at 724.

McGahee, 658 F.Supp. at 194.

The Areeda and Turner test has two primary rules for predatory pricing claims: (1) a price at or above the defendant's average variable cost [10] is conclusively deemed lawful and (2) a price below the defendant's average variable cost is conclusively deemed unlawful. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697, 733 (1975). Therefore, the Areeda and Turner test makes

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[10] The Areeda and Turner test uses average variable cost, an accounting concept, as a surrogate for marginal cost, an economic concept. For definitions of variable cost and marginal cost, see P. Samuelson, *Economics* 467-68 (10th ed. 1976).

evidence of a defendant's subjective intent irrelevant; instead it relies wholly upon a comparison between prices and average variable cost.

In *International Air*, the plaintiff appealed a jury verdict for the defendant, arguing that the district court erred in refusing to direct a verdict in plaintiff's favor on its Robinson-Patman Act claim. 517 F.2d at 720. In arguing for judgment notwithstanding the jury verdict, the plaintiff relied on evidence concerning defendant's subjective intent from defendant's internal company memoranda and related circumstantial evidence. *Id.* at 721-23. The Fifth Circuit panel, however, said a court must apply objective evidence of predatory pricing, based on defendant's prices and costs, before it could rule as a matter of law against the defendant. *Id.* at 723. The court stated that

> [i]n order to prevail as a matter of law,[30] a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.[31]

Id. at 724.

In footnote 30 of *International Air*, the Fifth Circuit panel added this dicta:

> Much of what we say here should be relevant to the requisite elements of a prima facie Robinson-Patman case. Indeed, in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696, n. 12, 702, n. 14, 87 S.Ct. 1326 [, 1333, n. 12, 1336, n. 14], 18 L.Ed.2d 406 (1967) the Supreme Court indicated that price below "cost" is perhaps, [sic] a necessary element of a prima facie case. However, because the Court repeatedly referred to "deteriorating price structure," the opinion may hold that it is not necessary to show a price below marginal cost in order to make out a prima facie case. To the extent that the opinion stands for the latter proposition, we limit our discussion to the elements necessary to sustain a motion for directed verdict.

Id. at n. 30. In determining the appropriate test, the district court extended the dicta "should be *relevant* to the prima facie elements" as used in footnote 30 of *International Air* and followed new Fifth Circuit cases that have interpreted *International Air* as giving the elements of a plaintiff's prima facie case. See *Adjusters Replace-A-Car, Inc. v. Agency Rent-A Car, Inc.*, 735 F.2d 884 (5th Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 83 L.Ed.2d 924 (1985); *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833, 105 S.Ct. 123, 83 L.Ed.2d 65 (1984).

[6] Accordingly, the district court applied the *International Air* test to defendant's motion for summary judgment. First, the district court found that the propane market had no significant barriers to entry.[11] Therefore, the district court did not apply the second part of the test—the "gloss"—from *International Air*. Then, the district court found that the plaintiff did not produce any evidence that the defendant sold propane below its average variable cost,[12] ignoring

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[11] The district court apparently focused on the lack of trade secrets, patents, and licenses in finding that there are no substantial barriers to entry in this market. Other factors, such as large capital outlays required to start a new business, the existence already of excess capacity by existing sellers, the price inelasticity of the market (*i.e.*, consumers do not consume much more if the price goes down or much less if the price goes up), and the difficulties buyers may have in changing suppliers are also relevant to this question. *See Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 938 F.2d 360, 366-67 (9th Cir.1988) (upholding jury finding that local propane market had high barriers to entry).

[12] McGahee brought to the district court's attention, several times, sales it contended were below average variable cost as average variable cost was computed by Northern Propane's expert. *See supra* note 5. Moreover, the district court expressed doubts about the allocation of variable and fixed costs by Northern Propane's expense, but made a factual finding nonetheless. *McGahee*, 658 F.Supp. at 196 n. 11. As this court has reiterated:

> [T]he district court must not resolve factual disputes by weighing conflicting evidence, *see Warrior Tombigbee Transportation Company v. M/V NAN FUNG*, 695 F.2d 1294, 1298 (11th Cir.1983), since it is the province of the jury to assess the probative value of the evidence, *see Odum v. Celotex Corp.*, 764 F.2d 1486, 1488 (11th Cir.1985). The

any evidence of defendant's subjective intent. *McGahee*, 658 F.Supp. at 192 ("the Court cannot and need not divine the intent behind defendant's pricing policy"). Following Areeda and Turner's proposed test, the district court concluded that "[t]hus, there is no issue for trial under *International Air*." *Id.* at 196.

The Areeda and Turner test is like the Venus de Milo: it is much admired and of and often discussed,[13] but rarely embraced.[14] Perhaps this reluctance to embrace is due to the substance from which it is formed. The Areeda and Turner test is carved from economic assumptions, not from antitrust statutes and judicial precedents. Perhaps this reluctance is due to attacks upon it.[15] The

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district court must not "assess[ ] the probative value of any evidence presented to it, for this would be an unwarranted extension of the summary judgment device." *Gauck v. Meleski*, 346 F.2d 433, 436 (5th Cir.1965).

Lane v. Celotex Corp., 782 F.2d 1526. 1528 (11th Cir.1986); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir.1986).

[13] See Liebler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 Notre Dame L.Rev. 1052 (1986) (discussing the academic literature and summarizing 55 predatory pricing cases since Areeda and Turner's 1975 article).

[14] By embraced, we mean adopted essentially as offered by Areeda and Turner. Arguably, both the Second and Fifth Circuits have embraced the Areeda and Turner test. *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884 (5th Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ci. 910, 83 L.Ed.2d 924 (1985); *Northeastern Telephone Co. v. AT & T*, 651 F.2d 76 (2d Cir.1981), *cert denied*, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982). The Fifth Circuit, however, carves an exception from the Areeda and Turner test for markets with high entry barriers. *Adjusters Replace-A-Car*, 735 F.2d at 891. For the various positions of our sister circuits, *see infra* nn. 38–44 & accompanying text; 3 Von Kalinowski, *Antitrust Laws & Trade Regulation* § 10.03151 & Table 10.1 (1988).

[15] For a lengthy list of academic articles criticizing the Areeda and Turner test, *see* E. Kinter, 2 *Federal Antitrust Law* § 13.3, 1988 Supplement to Vol. II, n. 102c (1980).

Areeda and Turner test has been criticized for being impractical,[16] for using static short-run analysis,[17] and for being too permissive of predatory activity;[18] these criticisms break any notion that economists[19] agree that the Areeda and Turner test is best.[20] We, like our sister circuits other than the Second Circuit and the Fifth Circuit, our Siamese twin, decline to embrace the Areeda and Turner test.

B. Our Quest For a Test For Predatory Pricing.

[7] The case at bar presents an issue of first impression for the Eleventh Circuit.[21] What is the appropriate test for predatory pricing

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[16] A key problem in any application of economics to litigation is that the economic definitions of cost have no counterparts in business accounting. Carstensen, *Predatory Pricing in the Courts: Reflection on Two Decisions*, 61 Notre Dame L.Rev. 928, 945 & n. 62 (1986). Areeda and Turner have responded to this criticism by redefining average variable cost to include costs an accountant would consider fixed. 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 715c, at 172-74, 176 (1978).

[17] *E.g.*, Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977). Areeda and Turner's redefinition of average variable cost also blunts this criticism. *See supra* n. 16.

[18] *E.g.* R. Posner, *Antitrust Law: An Economic Perspective* 191-93 (1976); Greer, *A Critique of Areeda and Turner's Standard for Predatory Practices*, 24 Antitrust Bull. 233 (1979).

[19] As a social science built on assumptions and statistics, economics is subject to the disparagement attributed by Mark Twain in his *Autobiography* to B. Disraeli: "There are three kinds of lies: lies, damned lies, and statistics."

[20] For a summary of various alternative tests, *see* Calvani & Lynch, *Predatory Pricing Under the Robinson-Patman and Sherman Acts: An Introduction*, 51 Antitrust L.J. 375 (1983).

[21] The former Fifth Circuit panels in *International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 724 n. 30 (5th Cir.1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976), and in *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 854 n. 17 (5th Cir. Unit B), *cert. denied*, 454 U.S. 1125, 302 S.Ct. 975, 71 L.Ed.2d 113 (1981) recognized that at that time the Fifth Circuit, as well as the Supreme Court, had not established a definitive test for examining a plaintiff's prima facie case when a defendant moves for summary judgment. The district court below also recognized that *International Air* did not establish the test that the Eleventh Circuit must use in evaluating a defendant's motion for summary judgment in an antitrust case based on predatory pricing. *McGahee*, 658 F.Supp. at 192 n. 5. *But see Adjusters Replace-A-Car, Inc.*

when an antitrust defendant moves for summary judgment or for a directed verdict? We begin our quest for a test at sources other than the thought provoking contributions of academics. We turn first to the antitrust statutes and judicial precedent. Based on these sources, we hold that when an antitrust defendant moves for judgment as a matter of law, the test for predatory pricing must consider subjective evidence and should use average total as the cost [22] above which no inference of predatory intent can be made.

1. *The Antitrust Statutes and Their Legislative History*

[8-10] Under 15 U.S.C. § 15, a private plaintiff such as McGahee may bring a civil action to recover threefold for damages for a violation of the substantive antitrust provisions. McGahee has alleged a Sherman Act claim and a Robinson-Patman Act claim. Predatory pricing is relevant to McGahee's claims because it is circumstantial evidence. In the Sherman Act claim, predatory pricing would be used to infer the intent necessary for an attempt to monopolize.[23] In the Robinson-Patman Act claim, proof of predatory pricing would be used to infer injury to competition.[24] On one

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v. Agency Rent-A-Car, Inc., 735 F.2d 884, 890 (5th Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 83 L.Ed.2d 924 (1985) (attempting to harmonize *International Air* and *Malcolm* with *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833, 105 S.Ct. 123, 83 L.Ed.2d 651 (1984)).

[22] Average total cost is the sum of average variable cost and average fixed cost. P. Samuelson, *Economics* 469 (10th ed. 1976).

[23] A distinction between a monopolization claim and an attempt to monopolize claim is that proof of specific intent is required for attempt claims. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602, 105 S.Ct. 2847, 2857, 86 L.Ed.2d 467 (1985); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 850-51 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 343 (1976). By definition, an "attempt to commit a crime, which is what a § 2 violation is, requires proof of (1) an intent to commit the crime, (2) an overt act toward its commission, (3) failure of consummation, and (4) the apparent possibility of commission. Black's Law Dictionary 116 (5th ed. 1979).

[24] Actually, in a Robinson-Patman Act claim, a double inference is made. An inference is made that a defendant who lowered prices to a predatory level intended to injure competition. From this inference of defendant's intent, a second inference, that the defendant did indeed injure competition,

hand, over one hundred years ago, Congress could not have foreseen the development of antitrust law in general, much less have foreseen the present debate over the appropriate test for predatory pricing. On the other hand, the statutes and their legislative histories reveal Congress's intent, the linchpin in interpreting a statute, as to what conduct the antitrust statutes prohibit.

[11] In relevant part, the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony." 15 U.S.C. § 2.[25] The Congressional debates[26] in 1890 indicate that Congress believed that under the common law of the individual states, "these combinations [we]re illegal without statute." 21 Cong.Rec. 2458 (1890) (Senator Teller). The public outcry over monopolies and the inadequacy of the states' common law necessitated federal legislation regulating monopolies involved in interstate commerce.[27] Accordingly, Congress drafted

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is then made. *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.), *cert. denied*, 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977).

[25] As amended December 21, 1974, Pub.L. 93-528 § 3, 88 Stat. 1708. For the legislative history of this amendment, *see* H.R.Rep. No. 1463, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S.Code Cong. & Admin.News 6535, 6540.

[26] "Although debates may not be used as a means for interpreting a statute (*United States v. Trans-Missouri Freight Association*, 166 U.S. [290] 318, [17 S.Ct. 540, 550, 41 L.Ed. 1007 (1897)] and cases cited), that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted." *Standard Oil Co. v. United States*, 221 U.S. 1, 50, 31 S.Ct. 502, 512, 55 L.Ed. 619 (1910).

[27] The debates in 1890 show "that the main cause which led to the legislation was the thought that it was required by the economic conditions of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, . . . and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." *Standard Oil Co. v. United States*, 221 U.S. 1, 50, 31 S.Ct. 502, 512, 55 L.Ed. 619 (1910). As Justice Harlan expressed it, "the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the

and enacted a broad, general statute that borrowed from the common law. 21 Cong. Rec. 3152 (Senator Hoar); 21 Cong.Rec. 3148 (Senator Edmonds); 21 Cong.Rec. 2456 (Senator Sherman); *Standard Oil Co. v. United States*, 221 U.S. 1, 51, 31 S.Ct. 502, 512, 55 L.Ed. 619 (1910); see generally Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U.Chi.L.Rev. 221, 240-47 (1956). Under the common law,

> prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices.

Standard Oil Co., 221 U.S. at 52, 31 S.Ct. at 512 (summarizing the common law related to monopolies); *see also id.* at 54 & 58, 31 S.Ct. at 513 & 515 (same). Congress made § 2 of the statute even broader than the common law. The common law prohibited acts that produced a monopoly, which then meant an undue restraint of trade; § 2 of the statute also prohibited any attempt to monopolize, even though the acts by which the attempt was made did not themselves produce a monopoly. Id. at 61, 31 S.Ct. at 516.

In passing antitrust legislation, Congress's purpose was not only an economic one, but was also a political one, a purpose of curbing the power some individuals and corporations had over the economy. See Letwin, 23 U.Chi.L.Rev. at 247-255; Pitofsky, The Political Content of Antitrust, 127 U.Pa.L.Rev. 1051, 1052 (1979); Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U.Pa.L.Rev. 1214, 1222-23 (1977). As Senator Sherman himself explained, "[i]f we will not endure a king as a political power we should not endure a king over

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slavery that would result from aggregations of capital in the hands of a few individuals and corporations . . . ." *Id.* at 83, 31 S.Ct. at 525 (Harlan, J., concurring and dissenting).

the production, transportation, and sale of any of the necessaries of life." 21 Cong.Rec. 2457 (1890).

Enacted in 1936, the Robinson-Patman Act strengthened the 1914 Clayton Act's prohibition of price discrimination. S.Rep. No. 1502 74th Cong., 2d Sess. 3 (1936); H.R. No. 2287, 74th Cong., 2d Sess. 3, 16 (1936); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 545, 80 S.Ct. 1267, 1272, 4 L.Ed.2d 1385 (1960). Section 2 of the Clayton Act, as originally enacted in 1914, provided as follows:

> That it shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities, . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition.

Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 13 (1982)). The House Report stated that § 2 of the Clayton Act was

> expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice where by certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country . . . In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly

> in the particular locality or section in which the discriminating price is made.

H.R.Rep. No. 2287, 74th Cong., 2d Sess. 8 (1914). In addition to the reasons for prohibiting price discrimination given by the House Report, the Senate Report added:

> Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities where their commodities are sold below cost or without a fair profit by raising the price of the same class of commodities above their fair market value in other sections or communities.

S.Rep, No. 698, 63d Cong., 2d Sess. 3 (1914). This legislative history makes plain that § 2 of the Clayton Act "was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543, 80 S.Ct. 1267, 1271, 4 L.Ed.2d 1385 (1959).

In relevant part, the Clayton Act today, as amended by the Robinson-Patman Act, provides that

> [i]t shall he unlawful for any person . . . to discriminate between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition . . . : *Provided*, That nothing herein contained shall prevent differentials which make only due allowances in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which such commodities are to be sold or delivered.

15 U.S.C. § 13(a). The 1936 Robinson-Patman amendments to the Clayton Act, among other things, strengthened the prohibitions against price discrimination by changing the exceptions carved from the general rule (the exceptions are the parts of the statute following "*Provided*"). As the Senate Judiciary Committee explained,

> [t]he weakness of present section 2 lies principally in the fact that: (1) It places no limit upon differentials permissible on

> account of differences in quantity; and (2) it permits discriminations to meet competition, and thus tends to substitute the remedies of retaliation for those of law, with destructive consequences to the central object of the bill. Liberty to meet competition which can be met only by price cuts at the expense of customers elsewhere, is in its unmasked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more destructive in the hands of the more powerful, and most deadly to the competitor of limited resources, whatever his merit and efficiency. While the bill as now reported closes these dangerous loopholes, it leaves the fields of competition free and open to the most efficient, and thus in fact protects them the more securely against inundations of mere power and size.

S.Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936).

[12] The Senate Report also explained that the amended statute's cost exception to the general rule

> limits the differences in cost which may be honored in support of price differentials, to those marginal differences demonstrable as between the particular customers concerned in the discrimination. It is designed, among other things, to preclude the grant of a discrimination to a particular customer equal to the whole saving in cost resulting to the seller's entire volume of business as augmented by that customer's patronage; to preclude also differentials based on allocated or imputed, as distinguished from actual, differences in cost, representing particular facilities or departments which the favored customer may not have immediately utilized, but with which the seller cannot dispense in the general conduct of his business.

Id. at 5-6.[28] Translated into the language of economists such as Areeda and Turner, this part of the legislative history makes clear

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[28] The version of this provision proposed by the Senate Judiciary Committee in 1936 differs slightly from the enacted statute in effect today, but the differences are immaterial to the present discussion. In addition, Congress illustrated this principle with an example based on injury to a buyer, but the phrase being explained applies equally to a seller's Robinson-Patman Act claim.

that Congress intended to limit the cost exception to differences in expenses particular to a customer, such as transportation savings, but did not intend to include within the exception sales above average variable cost even by a seller with excess capacity, who could produce additional goods without increasing fixed costs. *See also* H.R.Rep. No. 2287, 74th Cong., 2d Sess. 17 (giving other examples of economies of scale that result in lower costs and could lead to lower prices without violating the Act).

[13] In explaining the practices to be prohibited by the Act, the House Judiciary Committee in the House Conference Report expressed a similar concern with limiting differences to those specific to a particular customer:

> Discriminations in excess of sound economic differences between the customers concerned, in the treatment accorded them, involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them.

Id. at 8; see also S.Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936) (using similar language). Therefore, difference in price, even if the lower price is only too low to provide the seller any profit, are prohibited unless the difference is justified by differences between the customers.

In summary, Congress's exact intent when enacting the antitrust statutes as to what conduct established an antitrust violation is beyond the reach of human knowledge, but the statutes, their legislative histories, and common sense indicate that Congress intended for subjective evidence of a defendant's intent to be relevant. Predatory pricing provides only objective, circumstantial evidence of predatory intent. In determining how Congress intended proof to be made of antitrust violations, common sense suggests that objective, circumstantial evidence of prices and costs and direct and circumstantial evidence of subjective intent would both be important.[29] *Cf. Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S.

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[29] When considering the role Congress foresaw for objective evidence, *i.e.*, economics, in proving an antitrust violation, one must remember Congress did not have the advantage of the plethora of academic writings now

752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) (direct or circumstantial evidence may prove antitrust conspiracy). Furthermore, the Sherman Act being a criminal statute codifying and expanding the common law, and proof of its violation requiring a showing of specific intent, in addition to the legislative background of public outcry in 1890 against monopolies, Congressional concern with the economic and political power of large combinations and with restraining harmful but not all competition, and the distinction discussed in 1936 between differences in prices due to differences in costs related to a particular customer and to differences in price due to excess capacity, all make ignoring a defendant's subjective intent unsupportable.

The antitrust statutes and their legislative histories also indicate that Congress intended average total cost to be the objective standard used. The predatory pricing test requires a cost standard below which it may be inferred that a defendant violated the antitrust statutes. The Sherman Act and its legislative history do not offer guidance as to what measure of cost is relevant, except indicating that, as a codification of the common law, Sherman Act violations could be proven in part through objective evidence. The legislative history of both the Clayton Act and the Robinson-Patman Act, on the other hand, both offer specific guidance. The Robinson-Patman Act itself uses the word "cost," which should be interpreted as meaning all costs.[30] Moreover, the legislative history specifically explains that a seller cannot sell at average variable cost, without covering any fixed costs, even if he has excess capacity.

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available on the subject. The development of economic theory as applied to antitrust law is not to be ignored—in fact, courts should use it vigorously in furthering the Congressional intent of using objective evidence of prices and costs. On the other hand, an original Congressional intent of using evidence of a defendant's subjective intent is not to be ignored today just because the science (art?) of economics has made great strides since original passage of the statutes. Economics provides the means for evaluating the facts, not the elements of an antitrust violation.

[30] "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944).

Furthermore, the Robinson-Patman Act's legislative history refers to "the necessary minimum of profits or of actual costs;" the Clayton Act's legislative history refers to "below cost or without a fair profit." In economic terms, the cost of capital, which can be understood as the expected profit necessary to induce investors to invest, are also costs.[31] Including the cost of capital, expressed by Congress as "a fair profit" and as "the necessary minimum profit," indicates Congress intended all costs to be part of the standard.

2. *Supreme Court Precedent*

Three recent Supreme Court cases shed light on interpreting these antitrust statutes. Although these cases do not directly address the issues in this case, they suggest the proper definition of cost and the role of subjective evidence and costs in summary procedure in antitrust cases.

In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986), the Supreme Court held that a private plaintiff seeking injunctive relief under 15 U.S.C. § 16 must show a threat of antitrust injury, which means threat of an injury for which a plaintiff could eventually claim treble damages. In *Cargill*, the Court reversed the Tenth Circuit because the plaintiff did not show at the trial more than a threat of loss or damage due merely to increased competition and neither raised nor proved any claim of predatory pricing before the district court. In discussing predatory pricing, the Court first defined the term: "Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competition in the short run and reducing competition in the long run." *Id.* 107 S.Ct. at 493. The Court recognized the debate among the Circuit Courts of Appeal and among academics concerning "measure of cost" but did not indicate

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[31] "A fair profit" or "the necessary minimum of profits" may reflect an implicit or explicit cost, depending on how a company is capitalized. *See* E. Mansfield, *Microeconomics: Theory and Application 181* (4th ed. 1982) (defining implicit and explicit costs). Regardless of whether it reflects an implicit or explicit cost, it still should be considered a cost of production under the alternative cost doctrine (also known as the opportunity cost doctrine). *See id.* at 179 (defining and discussing the alternative cost doctrine).

what "measure of cost" or "cost" was appropriate. *Id.* at n. 12. The Court held that for the purposes of deciding *Cargill*, a definition of predatory pricing consistent with a definition of pricing below cost was sufficient,

> because only below-cost pricing would threaten to drive [plaintiff] from the market, see n. 9, *supra*, and because [plaintiff] made no allegation that [defendant] would act with predatory intent. Thus, in this case, as in *Matsushita Electric Indus. Co. v. Zenith Radio Corp., supra*, we find it unnecessary to "consider whether recovery should *ever* be available . . . when the pricing in question is above some measure of incremental cost." [sic] 475 U.S. at 585, n. 9, 106 S.Ct. at 1355, n. 9, or whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation. See n. 11, *supra*.

Id. The Court concluded that the plaintiff did not prove any claim of predatory pricing because the evidence "consist[ed] only of four passing references, three in deposition testimony, to the possibility that [defendant's] prices might dip below costs." *Id.* at 494. The Court also commented that other factors, such as the defendant's market share capacity and the barriers to entry after competitors have been driven from the market, must also be considered, because these factors indicate whether an illegal predator is capable of successfully pursuing a predatory scheme. *Id.* at n. 15. The Court warned that "[c]ourts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme. *See infra*, n. 17." *Id.* [32]

In *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1357 (1986), the Supreme Court held that a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. As in *Cargill*, the Court in *Matsushita* recognized the

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[32] The note referred to by the Supreme Court discusses *Matsushita* and emphasizes the care a court must use in evaluating a predatory pricing claim.

debate concerning what "cost" is relevant in a predatory pricing claim, but did not take sides in the debate. 106 S.Ct. at 1355 nn. 8 & 9. In *Matsushita*, rather than supporting a theory of conspiratorial predatory pricing injuring the plaintiffs, the evidence of conspiracy indicated a conspiracy that "actually tended to benefit" plaintiffs. *Id.* at 1356. The Court stated that "if the factual context renders [plaintiffs] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* The Court noted that in single firm cases, much less conspiracy cases,

> the likelihood that predatory pricing will benefit the predator is "inherently uncertain: the short run loss [from pricing below cost] is definite, but the long-run gain depends on successfully neutralizing the competition. . . . [and] on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." 475 U.S. at 588, 106 S.Ct. at 1357.

Cargill, 107 S.Ct. at 495 n. 17 (quoting *Matsushita*). Accordingly, the Court rejected the Court of Appeals' theory of conspiracy as making no practical sense.

In *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967), the evidence at the trial below showed that defendants, three large national companies, for over three years sold frozen pies in the Salt Lake City marketing area at prices below their cost and below their prices in other markets that were closer to their plants. The Court held this evidence was sufficient to support a finding of injury to competition despite the increasing sales volume of plaintiff, a local company, and the fact that plaintiff continued to make a profit. *Id.* at 702-03, 87 S.Ct. at 1336. The Court's opinion dealt with the conduct of each defendant separately, concluding that "there was some evidence of predatory intent with respect to each of these [defendants]." *Utah Pie*, 386 U.S. at 702, 87 S.Ct. at 1336. The Court said the first defendant "suffered substantial losses on its frozen pie sales," *id.* at 697, 87 S.Ct. at 1333, the second defendant had a price in Salt Lake City

that "was less than its direct cost plus an allocation for overhead,"[33] *id.* at 698, 87 S.Ct. at 1334, and the third defendant had prices that were "admittedly well below its costs," *id.* at 701, 87 S.Ct. at 1335. In addition, as to the first defendant, the Court held that the jury could rely on statements by the first defendant's management that plaintiff was "an unfavorable factor" that "d[u]g holes in our operation" in concluding that the first defendant's discriminatory pricing was aimed at injuring plaintiff. *Id.* at 696-97, 87 S.Ct. at 1332-33. Relying on this evidence to show predatory intent, the Court then relied on this predatory intent to show injury to competition. *Id. See generally* E. Kinter & J. Bauer, 3 *Federal Antitrust Law* § 22.8 at 285 & nn. 165 & 166 (1983).

In summary, the recent Supreme Court cases are consistent with the conclusions drawn from the survey above of the antitrust statutes and their legislative histories. *Utah Pie* bears most directly on the primary issues in the case at bar—whether subjective evidence is to be used and what cost standard is to be used. In *Utah Pie*, the Court used evidence of subjective intent in concluding a defendant had the requisite intent. The Court did not decide what cost standard should be used in the predatory pricing test, but held that the relevant cost could be "direct cost plus an allocation for overhead," which is inconsistent with Areeda and Turner's proposed average variable cost test. *Matsushita* and *Cargill* recognize the debate over the appropriate measure of cost, but in both cases the Supreme Court declined to define an appropriate standard. In *Cargill*, the Court considered objective evidence other than prices and costs, which does not necessarily support the use of subjective evidence, but is inconsistent with Areeda and Turner's predatory pricing test used by the district court, which relies solely on objective evidence of prices and costs.

C. The Eleventh Circuit Test for Predatory Pricing.

Determining that subjective evidence and average total cost are relevant does not end the matter. The Eleventh Circuit test for

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[33] Overhead is a fixed cost. P. Samuelson, *Economics* 466 (10th ed. 1976). Therefore, in *Utah Pie* the Supreme Court understood cost to be more than average variable cost.

predatory pricing must still be spelled out. As given below, the Eleventh Circuit test borrows from the tests used by a majority of our sister circuits and relies on the cases cited in the notes as in accord with our test for an explanation of the test's origins.

[14] If a defendant's prices were above average total cost then there is no predatory pricing and thus no circumstantial evidence of predatory intent.[34] Average total cost means the average of the total economic cost, which includes the necessary minimum profit.[35] Average total cost should theoretically be measured by long run marginal cost, but in appropriate cases a surrogate for total cost may be used.[36]

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[34] *Accord Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir.1987); *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 510, 511, 83 L.Ed.2d 401 (1984); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir.1983); *MCI Communications v. AT & T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *contra Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.) (allowing a plaintiff to prove by clear and convincing evidence that a defendant's prices above total cost were predatory), *cert. denied*, 464 U.S. 955, 104 S.Ct. 370, 78 L.Ed.2d 329 (1983).

[35] The amount of profit that is a part of total economic cost is an issue of fact requiring expert testimony particular to the market involved.

[36] Two cases have turned, in part at least, on the choice between long run marginal cost and fully distributed cost as the appropriate measure of total cost. *Southern Pacific Communications Co. v. AT & T*, 740 F.2d 980, 1005-07 (D.C.Cir. 1984) (expressing doubt about the usefulness of fully distributed costs as a measure of costs in predatory pricing cases), *cert. denied*, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985); *MCI Communications v. AT & T*, 708 F.2d 1081, 1114-123 (7th Cir.) (holding that long run marginal cost, not fully distributed cost, is the appropriate measure of total cost), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *see also Northeastern Telephone Co. v. AT & T*, 651 F.2d 76, 86-91 (2d Cir.1981) (holding short run marginal cost and its surrogate average variable cost, not fully distributed cost, is the appropriate measure of cost), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982). Long run marginal cost is an economic concept, which makes it preferable, while fully distributed cost is a specialized accounting concept. The relationship between fully distributed cost and long run marginal cost is similar to the relationship between average variable cost and short run marginal cost.

[15, 16] If a defendant's prices were below average total cost and above short run marginal cost, then there is circumstantial evidence of predatory intent. An inference of predatory intent, however, may not rest solely on prices of this nature. To withstand judgment as a matter of law, a plaintiff must have other evidence, either objective or subjective, of predatory intent.[37] *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1357, 89 L.Ed.2d 538 (1986) (antitrust plaintiff must present evidence that tends to exclude the possibility that defendant's conduct was as consistent with permissible competition as with illegal conduct). The closer a defendant's price is to average total cost, the stronger this other evidence must be for the plaintiff still to avoid summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) ("[t]he moving party is 'entitled to judgment as a matter of law' [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof"). As

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[37] *Accord Instructional Systems Development Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639 (10th Cir.1987); *Henry v. Chloride*, 809 F.2d 1334 (8th Cir.1987); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 510, 83 L.Ed.2d 401 (1984); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir.1980); R. Posner, *Antitrust Law, An Economic Perspective* 188-193 (1976); *contra Adjusters Replace-A-Car, Inc. v. Agency Rent-Car, Inc.*, 735 F.2d 884 (5th Cir. 1984) (in the general case, prices above average variable cost conclusively presumed non-predatory), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 83 L.Ed.2d 924 (1985); *Northeastern Telephone Co. v. AT& T*, 651 F.2d 76 (2d Cir.1981) (same), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438, 71 L..Ed.2d 654 (1982).

The Ninth and Sixth Circuits' cases above hold that prices above average variable cost are "rebuttably presumed" to be nonpredatory. Because the burden of proof on this issue is already on plaintiff, the effect is only to require evidence in addition to prices above average variable cost before a fact finder may infer predatory intent and to add verbiage that may confuse a jury. Therefore, we do not use the same language as the Ninth and Sixth Circuits, but the difference for those prices (below average total cost and above short run marginal cost) is one of semantics and not of substance.

suggested by Areeda and Turner, average variable cost may usually be used as a surrogate for short run marginal cost.[38]

[17, 18] If a defendant's prices were below short run marginal cost, then their circumstantial evidence is strong enough to create a rebuttable presumption of predatory intent.[39] *See Matsushita*, 106 S.Ct. at 1357 (antitrust plaintiff must present evidence that tends to exclude the possibility that defendant's conduct was as consistent with permissible competition as with illegal conduct); *Standard Oil Co. v. United States*, 221 U.S. 1, 52, 31 S.Ct. 502, 512, 55 L.Ed. 619 (1910) (summarizing the common law, from which the Sherman Act borrowed, as recognizing presumptions created by objective evidence); *cf.* Fed.R.Evid. 301 (presumptions in general in civil actions). If a defendant's prices were below short run marginal cost and the other evidence, subjective or objective, is sufficiently probative of defendant's predatory intent, then as a matter of law defendant has the predatory intent required to establish the attempt to monopolize element of a Sherman Act claim and to establish the injury to competition element of a Robinson-Patman Act claim. *International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir.1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). Again, average variable cost may be used as a surrogate for short run marginal cost.

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[38] When average variable cost is appropriate to use, as well as determining what costs are variable, is an issue of fact requiring expert testimony.

[39] Accord *Henry v. Chloride*, 809 F.2d 1334 (8th Cir.1987); *Indian Coffee Corp. v. Proctor & Gamble Co.*, 752 F.2d 891 (3d Cir), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L.Ed.2d 150 (1985); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.1984); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982); *but see Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884 (5th Cir. 1984) (prices below average variable cost conclusively establish plaintiff's prima facie case), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 83 L.Ed.2d 924 (1984); *Northeastern Telephone Co. v. AT & T*, 651 F.2d 76, 91 n. 24 (2d Cir.1981) (same), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982).

IV. McGAHEE'S SHERMAN ACT CLAIM

[19, 20] In McGahee's Sherman Act claim, he must show that Northern Propane intended to achieve a monopoly and that there was a dangerous probability Northern Propane would succeed. In granting summary judgment, the district court held that McGahee could not prove predatory pricing, which is the theory McGahee relies upon to establish the intent element.[40] *McGahee*, 658 F. Supp. at 192-96. Under the Eleventh Circuit test for predatory pricing, McGahee has presented evidence from which a fact finder could infer predatory intent. First, Northern Propane does not argue that its prices were above average total cost. Second, McGahee points to three items of evidence that are more than sufficient to create a factual issue as to predatory intent for sales at prices below average total cost and above average variable cost: (1) Northern Propane's investigation of McGahee's financial position, (2) Northern Propane's new policy of rent-free tanks designed to take advantage of McGahee's weak financial position, and (3) Northern Propane's internal memorandum declaring "contribute to Floyd's financial problems" to be a goal for Northern Propane's local office. Third, McGahee has pointed to evidence that, on the record before us, could show that Northern Propane sold propane at prices below its average variable cost.[41] Therefore, McGahee has presented evidence that creates a genuine issue of fact as to whether Northern Propane had the intent necessary for an attempt to monopolize claim.

[21] The district court also alternatively held that McGahee cannot prove the second element of an attempted monopolization claim. The court stated that it found no evidence that a predatory pricing scheme had a dangerous probability of success, basing this statement on defendant's inability to charge supracompetitive

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[40] We are not required in this case to decide what an antitrust plaintiff relying on a theory other than predatory pricing must show to establish the intent element of an attempt to monopolize claim.

[41] Reducing the price to particular customers, as the evidence discussed *supra* nn. 5 & 6 suggests Northern Propane did, is sufficient to create a jury issue. *C. E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1247 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 604, 88 L.Ed.2d 583 (1985).

prices,[42] plaintiff's increasing market share,[43] and the market's low entry barriers.[44] *McGahee*, 658 F.Supp. at 196-97. Although the factors the district court discussed are relevant, proving a dangerous probability of success in achieving a monopoly requires proof of the defendant's market power. *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 242-43 (5th Cir. 1978); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 266 (5th Cir.1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); 3 Von Kalinowski, *Anti-Trust Trade Law & Trade Regulations* § 9.01[2][a] (1988).

[22] When determining whether an issue of fact exists as to whether defendant's actions presented a dangerous probability of defendant achieving a monopolist's market power, a court examines the relevant market and defendant's market power before the attempt to monopolize began. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, 86 S.Ct. 347, 350, 15 L.Ed.2d 247 (1965) (dicta); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 982 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 390 (5th Cir.1962) (failure to determine defendant's market share warranted

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[42] Although the record does not indicate supracompetitive prices in the Camilla district, about 20 percent of Northern Propane's districts had "operating rates of return" of 18 percent or higher. Affidavit of Ronald E. Ingram. Among other things, these high rates of return suggest that a retail propane distributor can earn supracompetitive profits.

[43] *But see Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 992-93 (5th Cir.1983) (dangerous probability not negated by defendant's market share decrease from over 80 percent to 38 percent and plaintiff's market share increase from zero percent to 60 percent), *cert. denied* 465 U.S. 1100, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984); *cf. Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 689, 87 S.Ct. 1326, 1329, 18 L.Ed.2d 406 (1967) (upholding jury verdict in Patman–Robinson case despite plaintiff's steadily increasing sales volume).

[44] *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119-21 n. 15, 107 S.Ct. 484, 494 n. 15, 93 L.Ed.2d 427 (1986) (emphasizing importance of entry barriers in predatory pricing case); *but see supra* n. 11 (suggesting whether barriers to entry are high in this case is a question of fact).

withdrawal of charge from jury), *cert. denied*, 372 U.S. 907, 83 S.Ct. 721, 9 L.Ed.2d 717 (1963); *e.g., Quality Foods v. Latin American Business Development Corp.*, 711 F.2d 989, 996 (11th Cir.1983); *see also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119-21 n. 15, 107 S.Ct. 484, 494 n. 15, 93 L.Ed.2d 427 (1986) (emphasizing importance of market share in predatory pricing case); *but see Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir.1980) (market power only a factor to consider when determining whether defendant had the specific intent to monopolize), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981).

[23, 24] Determining whether a defendant possesses sufficient market power to be dangerously close to achieving a monopoly requires analysis and proof of the same character, but not the same quantum, as would be necessary to establish monopoly power for an actual monopolization claim. *See generally* 3 Von Kalinowski: *Antitrust Laws & Trade Regulation* § 9.01[2][a] (1988); L. Sullivan, *Antitrust* 137 (1977). The best test from which market power may be inferred is relative size, *i.e.*, the percentage of market share. *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). The market share necessary for a defendant to be capable of posing a threat of achieving monopoly power depends on the type of factors concerning Northern Propane and McGahee discussed by the district court. *McGahee*, 658 F.Supp. at 196-97. *Cf. United States v. Columbia Steel Co.*, 334 U.S. 495, 528, 68 S.Ct. 1107, 1124, 92 L.Ed. 1533 (1948) ("the relative effect of percentage command of a market varies with the setting in which that factor is placed") (actual monopolization case); *United States v. Empire Gas Corp.*, 537 F.2d 296, 305-07 (8th Cir.1976) (upholding finding of fact in nonjury case that retail propane distributor with 50 percent market share did not present dangerous probability of success), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977).

[25] In this case, it is "undisputed"[45] that Northern Propane had sixty or sixty-five percent of the relevant market when the alleged predatory pricing began. Without examining any factors to determine what market share would be necessary for Northern Propane's alleged predatory pricing to present a dangerous probability of success, we can say that a sixty or sixty-five percent market share is a sufficiently large platform from which such a scheme could be launched to create a genuine issue of material fact as to whether there was a dangerous probability that Northern Propane would succeed in achieving a monopoly. *Cf. American Tobacco Co. v. United States*, 328 U.S. 781, 797, 66 S.Ct. 1125, 1133, 90 L.Ed. 1575 (1946) ("over two-thirds of the entire field of cigarettes, and . . . over 80 percent of the field of comparable cigarettes" held to constitute "a substantial monopoly"); *Kelco Disposal v. Browning-Ferris Industries*, 845 F.2d 404, 409 (2d Cir.1988) (market share above fifty-five percent sufficient, along with other market characteristics, to establish dangerous probability of success); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir.1982) (decline from forty percent to thirty percent insufficient to establish defendant's "capacity to monopolize"); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n. 2 (5th Cir.1969) (fifty percent market share may be sufficient to establish monopoly power).

V. McGAHEE'S ROBINSON-PATMAN ACT CLAIM

[26] In McGahee's Robinson-Patman Act claim, he must show that Northern Propane, in the course of interstate commerce, discriminated in price between different purchasers and a reasonable possibility that this price difference may harm competition. The district court held that McGahee's Robinson-Patman Act claim failed

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[45] In McGahee's brief, he relies on statements in affidavits by competitors on the fringe of the relevant geographic market and on conclusory statements of an expert, whose analysis focused on the proper test for predatory pricing, to establish the dangerous probability of success element. Northern Propane responds by attacking these sources of evidence and by pointing out that it is "undisputed" that Northern Propane's market share declined from 65 percent in 1981 to 35 percent in 1983. Therefore, we assume, arguendo, that Northern Propane's market share when McGahee opened for business was 65 percent. *See also supra* n. 4.

because McGahee could not establish predatory pricing.[46] *McGahee*, 658 F.Supp. at 197. Proof of predatory pricing can satisfy the second element, harm to competition, in a Robinson-Patman claim brought against a competing seller.[47] *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967). As already explained in relation to McGahee's Sherman Act claim, McGahee has presented evidence of predatory prices from which a fact finder could infer predatory intent. Therefore, whether Northern Propane's alleged discriminatory pricing caused injury to competition presents genuine issues of material fact.

VI. CONCLUSION

Accordingly, the summary judgment granted by the district court is reversed. The case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[46] The district court did not discuss, but the parties have argued about, price discrimination and interstate commerce. The record indicates that there is an issue of fact as to whether Northern Propane practiced price discrimination. *See supra* n. 6. In addition, the Supreme Court has held that sales similar to Northern Propane's sales as described in McGahee's deposition were interstate sales within the meaning of the Robinson-Patman Act. *Standard Oil Co. v. FTC*, 340 U.S. 231, 236-38, 71 S.Ct. 240, 243-44, 95 L.Ed. 239 (1951); *see also Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145 (1954).

[47] The reasonable possibility of harm to competition can be shown in two ways: "either directly by market analysis showing injury to competition, or by inference from injury to the plaintiff-competitor accompanied by defendant's predatory intent, the logic for the latter method being that 'an illicit intent accentuates the probability that a prohibited consequence will come to pass.'" *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344 (8th Cir. 1987) (quoting F. Rowe, *Price Discriminatiuon Under the Robinson Patman Act*, 44 (1962)). Because of our holding concerning predatory pricing, we do not reach the issue of whether McGahee could prove injury to competition through market analysis. *See generally* 4 Van Kalinowski, *Antitrust Laws & Trade Regulation* §§ 29.02 & 29.03 (1988); E. Kinter & J. Bauer, 3 *Federal Antitrust Law* §§ 22.8 & 22.9 (1983).

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

H. FLOYD McGAHEE,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	C83-2617A
NORTHERN PROPANE GAS COMPANY,	:	
Defendant.	:	

ORDER

I. Introduction

Plaintiff H. Floyd McGahee ("McGahee") brought this antitrust action under Section 2 of the Sherman Act, 15 U.S.C. § 2, and under the Robinson-Patman Act, 15 U.S.C. § 13(a), alleging that defendant Northern Propane Gas Company ("Northern Propane") practiced predatory pricing in the retail sale of propane gas. Defendant has moved for summary judgment pursuant to Rule 56, Fed.R.Civ.P. For the reasons stated below, the Court will grant defendant's motion.

The following truncated version of the relevant facts should suffice for present purposes. Propane is a liquid hydrocarbon by-product of crude petroleum and natural gas. The fuel is used for heating and for agricultural functions, such as crop-drying. Because propane does not yield carbon monoxide when burned, it is well-suited to operate industrial vehicles that are used indoors (e.g., forklifts). Propane is a fungible product; consequently, price is of prime importance in the marketplace. Prior to 1981, propane prices were subject to federal regulation. This case involves developments after the market was deregulated in mid-1981.

During the relevant period, the parties operated competing retail propane sales outlets in the Camilla, Georgia area. From September, 1979 to June, 1981, McGahee served as Northern Propane's district manager. McGahee had long been a fixture in the Camilla area, having worked at the same propane outlet for

approximately thirty years under several owners.[1] In June, 1981, however, McGahee was demoted to a salesperson position because, according to defendant, he failed to keep adequate records, to keep the accounts receivable current, and to follow company directives. McGahee resigned from defendant's employ on October 9, 1981, under contentious circumstances.[2]

In May 1982, after obtaining a loan from the Small Business Administration, plaintiff started his own propane sales business. Once on his own, plaintiff acquired a significant percentage of the market and of defendant's client base, and the price war giving rise to this action ensued. With this limited background in place, the Court will turn to the pending motion, highlighting additional facts where appropriate.

II. Analysis

A) *The Summary Judgment Standard*

At the outset, the Court will set forth the standard controlling practice under Rule 56. To prevail at summary judgment, the moving party must demonstrate the absence of genuine disputes of material fact and factual inferences. *Thrasher v. State Farm Fire and Casualty Co.*, 734 F.2d 637, 638-39 (11th Cir. 1984) (per curiam). Recent Supreme Court cases have explained that the moving party need not negate the nonmoving party's case; instead, "the burden on the moving party may be discharged by 'showing' — that is,

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[1] In September, 1979, Northern Propane's then-parent company, InterNorth, Inc. ("InterNorth"), purchased the retail propane outlet in Camilla from Amoco Oil. InterNorth employed Northern Propane, a wholly-owned subsidiary, to operate its retail propane outlets in the United States. On November 30, 1983, InterNorth sold all its stock in Northern Propane to Penn Central Energy Group.

[2] Defendant had filed a counterclaim against plaintiff, alleging that he breached his fiduciary duties while under its employ. Specifically, defendant alleged that plaintiff engaged in self-dealing by extending credit to a corporation in which he had a financial interest, McGahee Family, Inc. In addition to the alleged conflict of interest, the counterclaim asserted that plaintiff's allocation of credit to McGahee Family, Inc. was wrongful because the corporation was not credit-worthy. Defendant voluntarily dismissed the counterclaim on February 25, 1985.

pointing out . . . — that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986). If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. *Celotex*, 106 S.Ct. at 2553-54. Thus, summary judgment is appropriate where there is no genuine issue of material fact and, viewed in the light most favorable to the nonmoving party, the undisputed facts warrant judgment as a matter of law. *Id.* at 2555.

There are, to be sure, factual disputes in the record presented here, but these disputes are not material under the applicable law. Plaintiff argues that defendant acted in large measure out of personal animus. Following this theme, plaintiff depicts himself as an underdog facing a national company bent on destroying his business and monopolizing the relevant market through predatory price cuts.[3] Defendant counters that it acted solely to maintain its share of a stagnant market. In ruling on the instant motion, the Court cannot and need not divine the intent behind defendant's pricing policy. Nonetheless, viewing the record objectively, as is proper in a predatory pricing case, *see, e.g., Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984), the Court concludes that plaintiff's claims fail as a matter of law.

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[3] For the purposes of the instant motion, defendant conceded that the relevant product market is propane and that the relevant geographic market is Mitchell and Baker counties in the southwestern region of Georgia. The Court notes, however, that there are some difficulties with plaintiff's asserted relevant geographic market. The cost of transportation limits the range in which a retail propane seller can operate profitably, but there is evidence that propane distributors who were active in Mitchell and Baker counties were also active in neighboring counties. On the other hand, even though other fuels may substitute for propane, there is, at the very least, an issue of fact as to whether propane constitutes a distinct product market. *See United States v. Empire Gas Corp.*, 537 F.2d 296, 303-304 (8th Cir. 1976), *cert. denied*, 424 U.S. 1122 (1977).

B) *The Sherman Act Claim*

To establish an attempted monopolization claim under Section 2 of the Sherman Act,[4] a plaintiff must show (1) that the defendant attempted to achieve a monopoly, and (2) that there was a dangerous probability of success. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *Tiftarea Shopper, Inc. v. Georgia Shopper, Inc.*, 786 F.2d 1115 (11th Cir. 1986) (per curiam); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 996 (11th Cir. 1983). Plaintiff's claim fails to satisfy either element of this test.

1) Attempt to Monopolize

It is well-settled that proof of a predatory price scheme can satisfy the first element of a Section 2 claim. *E.g., id.* There is vast disagreement, however, regarding the proper standard for determining whether a defendant has engaged in predatory pricing.[5]

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[4] Section 2 of the Sherman Act provides the following:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[5] Most Circuits have followed some adaptation of the cost-based analysis first advocated by Professors Areeda and Turner in their landmark article, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975). *See, e.g., Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *AT&T v. FCC*, 602 F.2d 401, 410 n.49 (D.C. Cir. 1979); *Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *International Air Industries v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). The Supreme Court has also indicated a preference for cost-based analysis over traditional notions of intent. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1355 n.8, n.9 (1986).

In the instant case, plaintiff advocates a test relying on traditional notions of intent and long-term cost analysis. Defendant argues that the

Neither the Supreme Court nor the Eleventh Circuit has set forth a definitive standard, so the Court must elect which of the competing standards to employ. This task requires an understanding of the nature of predatory pricing and the role such schemes play in the economy.

In a predatory pricing scheme, a dominant firm drastically cuts its prices to drive weaker rivals from the market or to deter new rivals from entering the market. *See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1355 n.8 (1986). "Predation in any meaningful sense cannot exist unless there is a temporary sacrifice of net revenues in the expectation of greater future gains." Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697, 698 (1975); *see also Matsushita*, 106 S.Ct. at 1357; *International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U.Chi.L.Rev. 263, 268 (1981). Thus, to succeed, a predator must tame the market sufficiently to achieve the power to set supracompetitive prices; in addition, the predator must retain monopoly power long enough for "[t]he . . . flow of profits, appropriately discounted, . . . to exceed the present size of the losses" incurred by the price cut. R. Bork, *The Antitrust Paradox* at 145 (1978); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 292 (1977); Areeda & Turner, *supra*, 88 Harv.L.Rev. at 698. Of course, in a market with pronounced entry barriers, a predator's investment is less risky, since it is easier to retain monopoly power in such a market. *Id.* at 699; *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 891 (5th Cir. 1984), *cert. denied*, 469 U.S.1160 (1985); *International Air*, 517 F.2d at 724.

Court is bound by the modified Areeda/Turner test employed by the former Fifth Circuit in *Industrial Air*, 517 F.2d at 724. As developed further in the text below, *see infra* at 10-12, *Industrial Air* may well be dispositive, binding precedent; moreover, the Court concludes that the approach followed in *Industrial Air* is the most sound.

Given the inherently speculative nature of predatory pricing schemes, "there is a consensus among commentators that . . . [such tactics] are rarely tried, and even more rarely successful." *Matsushita*, 106 S.Ct. at 1357-58; *see* R. Bork, *supra*, at 149-55; Areeda & Turner, *supra*, 88 Harv.L.Rev. at 699; Koller, *The Myth of Predatory Pricing - An Empirical Study*, 4 Antitrust Law & Econ.Rev. 105 (1971). On the other hand, advancing a claim of predatory pricing may seem attractive to an inefficient competitor reeling from stiff price competition. Because such suits can stifle competition, a standard that can be applied readily at summary judgment may best serve antitrust policy. *See, e.g., Williamson, supra*, 87 Yale L.J. at 288; *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818-20 (1982). [6]

Against the foregoing backdrop, the Court has little trouble rejecting plaintiff's suggestion that this case be judged under traditional subjective notions of intent. Simply stated, an objective test for predatory pricing is necessary to forestall nuisance suits that could chill the vigorous price competition that antitrust laws seek to foster. Accordingly, in recent years, courts faced with predatory pricing claims have almost uniformly relied on cost-based standards. There is, nonetheless, considerable debate as to which cost-based test is superior. *See generally* Vawter & Zuch, *A Critical Analysis of Recent Federal Appellate Decisions on Predatory Pricing*, 51 Antitrust L.J. 401 (1983). As noted above, *see supra* at n.5, the Court will apply the test enunciated by the former Fifth Circuit in *International Air*, a test based largely on rules first formulated by Professors Areeda and Turner.

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[6] As Professor Williamson has explained,

> To be sure, the demise of any firm has painful consequences for the affected employees and investors. Seen in a broader context, however, the elimination of inefficiency is a leading benefit of competition. It is crucial to make the distinction between protecting competitors and protecting competition. Sentiment is a cruel hoax if it leads to protecting competitors, since the consumer is invariably the loser when such rules are introduced.

Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 288-89 (1977).

Areeda and Turner proposed two chief rules for judging predatory pricing claims: (1) "a price at or above the defendant's average variable cost should be conclusively presumed lawful"; and (2) "a price below reasonably anticipated average variable cost should be conclusively presumed unlawful."[7] Areeda and Turner, *supra*, 88 Harv.L.Rev. at 733; *see also* P. Areeda and D. Turner, *Antitrust Law* ¶¶ 711-722 (1978); Areeda & Turner, *Williamson on Predatory Pricing*, 87 Yale L.J. 1337 (1978). These rules rest on the theory that a price above or equal to average variable cost ("AVC") is reasonable because at such a price the seller is more than defraying the cost of producing each unit. Conversely, at a price under AVC, the seller is losing money on each unit; such conduct, the theory goes, evinces a desire to drive others from the market so that supracompetitive prices can be set after a monopoly is attained. Rivals may well be destroyed by pricing policies set at the AVC of a leading firm, but only if they are less efficient. Areeda and Turner concluded that, in most markets, the assets of failing rivals would fall into the hands of new and more efficient firms. 88 Harv.L.Rev. at 698-99. This scenario is consonant with the policies underlying the antitrust laws. *See supra* at n.6.

In *International Air*, the former Fifth Circuit accepted Areeda and Turner's basic premises but added a significant gloss. Specifically, the court formulated a different standard for markets in which entry barriers are extremely high. In such cases, a plaintiff can prevail by showing that the defendant "is charging a price below its short-run, profit-maximizing price . . . ." 517 F.2d at 724. The court offered the following rationale for this approach:

> We employ the profit maximizing standard only because of our deference to a situation in which a monopolist

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[7] Average variable cost is the sum of all costs that vary according to output divided by the output. It is employed as a surrogate for a more instructive measure, marginal cost, which is the increase to total cost resulting from each additional increment of output. This substitution is necessary because marginal costs are difficult to ascertain and is acceptable because marginal cost will exceed average variable cost only when a firm approaches its maximum output, an unlikely time for predation. *See International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 724 n.28 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

> could drive a slightly less efficient firm out of the market by charging a price above its own average cost, but then charge a very high price because of the difficulty of new entry. This standard should be applied only when the barriers to entry are extremely high. The lower the barriers to entry in a market, the closer to marginal cost a monopolist would have to set its price in order for a plaintiff to prevail as a matter of law, for we see no social utility in insuring the survival of inefficient firms where a new entry is possible.

Id. at 724 n.31.

Defendant contends that the Court is bound by *International Air* and that that case demands that judgment be entered in its favor. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (decisions rendered by the former Fifth Circuit before October 1, 1981, are binding upon the courts of the Eleventh Circuit). Plaintiff asserts that the holding of *International Air* applies only to cases in which a plaintiff seeks to prevail as a matter of law. This is a close question. The *International Air* Court noted that its statements "should be relevant to the prima facie elements" of a predatory pricing claim, but the holding is arguably limited to "the elements necessary [for a plaintiff] to sustain a motion for a directed verdict."[8] 517 F.2d at 724 n.30. Panels of the new Fifth Circuit have concluded that *International Air* establishes the prima facie case for predatory pricing. *Adjusters Replace-A-Car*, 735 F.2d at 890; *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d at 305; *but see Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981). This arcane point is of little significance, however, for the Court would use the *International Air*

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[8] The *International Air* Court was concerned that its preferred view would run counter to the Supreme Court's holding in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). *See* 517 F.2d at 724 n.30. *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1355 n.8 (1986), indicates that *Utah Pie* does not resolve the "debate . . . about what 'cost' is relevant in [predatory pricing] cases." Thus, *Matsushita* suggests *International Air* should be read for the broader of its two plausible holdings.

test to define plaintiff's prima facie case in any event.[9] Subjective evidence of intent or other measures of cost may be of some relevance. But, unless pronounced entry barriers exist, a plaintiff must submit some evidence of sales below AVC to present a triable issue as to predatory pricing.

In the instant case, plaintiff's claim fails under the *International Air* test. To be sure, the parties' fierce price war injured McGahee. The inquiry, however, must focus on an objective analysis of the relevant market and on defendant's pricing strategy. Mere injury is not enough to sustain a predatory pricing claim, and that is all plaintiff has shown.

As to market conditions, the record demonstrates that there were no significant entry barriers. Typical examples of entry barriers include the following: (1) the need for a government license; (2) lack of access to a patent, trade secret, or other indispensable element of production; (3) prohibitively high capital costs peculiar to new market entrants; and (4) entrenched buyer preferences. P. Areeda & D. Turner, *Antitrust Law* ¶ 409 (1978); *see also Adjusters Replace-A-Car*, 735 F.2d at 893-94.

Assessing a closely related market, the Eighth Circuit concluded that "barriers to entry in this industry are minimal . . . ." *United States v. Empire Gas. Corp.*, 537 F.2d 296, 305 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). It is not difficult to obtain a license to sell propane, and the fuel is available to new

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[9] Plaintiff criticizes the Areeda-Turner approach on the grounds that it relies on a static economic analysis devoid of strategic considerations. *See* Williamson, *Predatory Pricing: A Strategic Welfare Analysis*, 87 Yale L.J. 284 (1977) He advocates a test relying on long-run incremental cost and traditional notions of intent.

Over the short run, the AVC rule encourages the most efficient use of economic resources. The rules advocated by plaintiff are more difficult to apply and less likely to yield an efficient economy. *See International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Plaintiff's proposed rules might be justified if predatory pricing were a serious problem, but, as noted above, *see supra* at 7-8, it is not. Thus, in the Court's view, the entry barrier gloss added by *International Air* is sufficient to prevent the limited practical potential for the strategic use of above variable cost pricing.

firms. Certainly, the initial capital investment is not prohibitive. Plaintiff was able to obtain a Small Business Administration loan and quickly garner a large share of the market. This scenario, in itself, effectively rebuts plaintiff's contention that entry barriers existed. *See Adjusters Replace-A-Car*, 735 F.2d at 893-94. Furthermore, defendant has stated, without contradiction, that other former employees have successfully started their own propane sales businesses. To the extent customer loyalty or buyer preference is a factor, plaintiff had the edge. Given plaintiff's well-established ties to the community, he was able to win over many of defendant's customers. The record indicates that, even at a higher price, many propane users preferred to buy from plaintiff. In sum, while defendant undoubtedly enjoyed some competitive advantages, they are not significant enough to invoke the alternative "profit maximizing standard" set forth in *International Air*.[10] Thus, plaintiff can avoid summary judgment only if there is an issue of fact under the AVC standard.

The AVC standard turns on the defendant's costs rather than the plaintiff's. *International Air*, 517 F.2d at 724-25. Thus, it is irrelevant that defendant's prices were set below plaintiff's costs. Convinced that *International Air* is unsound in principle, plaintiff devoted most of his energy to advocating alternative tests. *See supra* at notes 5 and 9. There is, perhaps as a result of this tactic, nothing from plaintiff in the record to show that defendant sold propane below its AVC. The only evidence as to defendant's pricing policy was submitted by defendant in an effort to disprove plaintiff's theory. *Celotex* and other recent cases teach that defendant's effort on this score was superfluous, *see infra* at note 11; nonetheless, the effort is persuasive.

Defendant's argument as to the AVC standard is supported by the affidavits of Hugh A. Gower ("Gower"), who is a partner in the accounting firm of Arthur Andersen & Company, and who is familiar with the relevant market. Viewed as a whole, Gower's

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[10] It must be remembered that entry barriers must be "extremely high" for the profit maximizing standard to be applicable. *International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 724 n.31 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

affidavits set forth defendant's average variable costs and show that there were no significant sales below those costs. Plaintiff has disputed certain of Gower's calculations but has not submitted any evidence that these disputes are critical to the bottom line.[11] Nor has plaintiff submitted any independent evidence of sales below defendant's AVC. Thus, there is no issue for trial under *International Air*. Even if there were, summary judgment would be proper because plaintiff cannot satisfy the second element of an attempted monopolization claim — a dangerous probability of success. *Swift*, 196 U.S. at 396.

2) Dangerous Probability of Success

Explaining the dangerous probability element, the Fifth Circuit offered the following observation:

> If the market structure will not allow a dominant firm to set its price above the competitive level, the strictures of the antitrust laws are not activated. The injury to plaintiffs' business is not cognizable under the antitrust laws if competition itself is not harmed.

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[11] Plaintiff's challenges to Gower's affidavits are not without force. For example, plaintiff points out that Gower did not include wages as a variable cost. In the abstract, it is certainly debatable that wages qualify as a variable cost, and an issue of fact can exist as to whether certain costs are variable or fixed. *See Adjusters Replace-A-Car v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 891 n.6 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). Gower has, however, offered a reasonable explanation for his approach. See Affidavit of Hugh A. Gower at ¶ 16. ("Northern Propane had excess capacity and could have sold a significant number of additional gallons of propane gas without hiring additional employees . . . .") And plaintiff has neither refuted this explanation nor submitted any contrary expert testimony. The Court also notes that Gower defined several arguably fixed costs as variable. *Id.* at ¶ 24, Exhibit B and Exhibit B-1.

Thus, it would be proper to conclude that Gower's testimony negated plaintiff's claim. In other words, defendant's showing exceeded the burden imposed by Rule 56. It bears emphasizing once again that defendant was not required to affirmatively rebut plaintiff's theory. Under the Supreme Court's recent pronouncements on summary judgment, merely pointing out that plaintiff's claim lacked factual support shifted to plaintiff the burden of producing some evidence of sales under defendant's AVC. *See supra* at 3-4. Despite ample discovery, plaintiff failed to satisfy that burden.

Adjusters Replace-A-Car, 735 F.2d at 894. Here, the primary marketing feature of the product at issue is price, since propane is fungible. Thus, absent extremely favorable conditions, a propane seller would have little hope of recouping the loss resulting from severe price cuts.

There is no evidence that defendant has ever been able to obtain supracompetitive prices, and this prospect seems unlikely. While defendant controlled a large segment of the market, there were four significant market participants and two lesser lights. Any effort to charge inflated prices would likely have caused defendant to lose business to the other established firms. Even if price cuts could temporarily drive all competitors from the putative relevant market — Mitchell and Baker counties — they would return as soon as defendant raised its prices.[12]

Furthermore, plaintiff's rapid success in the market reveals that changing propane suppliers is simple. That fact coupled with relatively low start-up costs suggests that new sellers would enter the market even if defendant could drive its competitors out of business entirely.[13] The Court also notes that defendant's market share declined during 1981-1983. Courts have viewed such declines as evidence that an alleged attempt to monopolize is not dangerously close to success. *E.g.*, *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982). Consequently, even assuming *arguendo* that defendant attempted to achieve a monopoly through predatory price cuts, the Court finds no evidence that such a scheme had a dangerous probability of success.

Accordingly, the Court will grant summary judgment as to plaintiff's Sherman Act claim.

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[12] As noted above, see *supra* at note 3, no propane dealer confined its operations to Mitchell and Baker counties. In fact, the parties competed with eight other propane retailers in a nine-county area.

[13] The Court acknowledges that new market participants might be deterred because the relevant market was stagnant. By the same token, the limited potential for market growth made it less likely defendant could hope to reap significant benefits from its alleged predatory conduct.

C) *The Robinson-Patman Act Claim*[14]

Plaintiff's Robinson-Patman act claim is based on defendant's sales in Mitchell and Baker counties at prices below those charged in other counties. There is little to be said on this claim. *International Air* holds that a predation theory, if valid, will support a Robinson-Patman Act claim. *See also Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). Still, because identical standards control predation theories under both statutes, the Court's conclusion as to the claim under Section 2 of the Sherman Act dictates that the Robinson-Patman Act claim be dismissed. *See, e.g., Bayou Bottling*, 725 F.2d at 305 (applying *International Air* to a claim under Section 2 of the Sherman Act).

III. Conclusion

What has been said above, especially with respect to the dangerous probability of success factor, demonstrates that plaintiff's theory is almost as implausible as the conspiracy theory advanced in *Matsushita*. There, Justice Powell cautioned against carelessly allowing such theories to proceed to trial: "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." 106 S.Ct. at 1360. The record shows that there were ill-feelings between the parties and that plaintiff suffered as a result of the price war. These facts may be lamentable; we all feel for the small businessperson who cannot compete with a large, well-heeled concern. But the

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[14] In pertinent part, the Robinson-Patman Act provides as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in each discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

antitrust laws promote competition and efficiency. Judged under objective criteria, plaintiff's claims fail to implicate those goals. As has been stated often, antitrust laws protect competition, not individual competitors. *See supra* at note 6.

Therefore, defendant's motion for summary judgment is GRANTED. The Clerk is DIRECTED to enter judgment accordingly.

IT IS SO ORDERED, this 10th day of April, 1987.

/s/ Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

Appendix C

United States Court of Appeals
For The Eleventh Circuit

No. 87-8379
D.C. Docket No. 83-2617

H. FLOYD McGAHEE,

Plaintiff-Appellant,

versus

NORTHERN PROPANE GAS COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

Before HATCHETT and EDMONDSON, Circuit Judges, and LYNNE*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff appellant, the costs on appeal to be taxed by the Clerk of this Court.

---

* Honorable Seybourn H. Lynne, Senior U. S. District Judge for the Northern District of Alabama, sitting by designation.

Entered: October 27, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: DEC. 29, 1988

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8379

H. FLOYD McGAHEE,

Plaintiff-Appellant,

versus
NORTHERN PROPANE GAS COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion October 27, 1988, 11 Cir., 198 __, __ F.2d __).
(December 20, 1988)

Before HATCHETT and EDMONDSON, Circuit Judges, and LYNNE*, District Judge.

PER CURIAM:

(X) The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a

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* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:
/s/ Jack W. Hatchett
United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
APR 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

Docket No. 88-1603

In The

Supreme Court of the United States

October Term 1988

NORTHERN PROPANE GAS COMPANY,

Petitioner

v.

H. FLOYD McGAHEE,

Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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5 1 pp

QUESTIONS PRESENTED

1.

Respondent shows that the first question stated by Petitioner is not fairly presented by the record and decision in this case. Contrary to the assumption implicit in the first question, the Eleventh Circuit did not rule that a firm with a large market share must sell above average total cost plus a reasonable profit in order to avoid subjecting it to the risk that a trier of fact will infer predatory intent. Further, the first question is premised on the assumption that Petitioner's sales were above average variable cost, while the record contains evidence of sales below average variable cost.

2.

Respondent shows the second question stated by Petitioner does not arise from the record in this case. Specifically, the second question is premised on the assumption that there are no barriers to entry in the relevant market, and the assumption that Petitioner had no ability to raise prices in the relevant market. These assumptions are contradicted by the evidence identified in the Eleventh Circuit Decision, and by other facts in the record.

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Docket No. 88-1603

In The

Supreme Court of the United States

October Term 1988

NORTHERN PROPANE GAS COMPANY,

Petitioner

v.

H. FLOYD McGAHEE,

Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondent, H. Floyd McGahee, within thirty (30) days after receipt of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (hereinafter "Petition"), submits the following opposition to the Petition.

I. STATEMENT OF THE CASE.

A. Proceedings Below.

Respondent McGahee's Complaint was filed on November 30, 1983. (R1-1-1). The Complaint alleged that Petitioner Northern Propane violated Section 2 of the Sherman Act, 15 U.S.C. Section 2, by monopolizing and attempting to monopolize the retail distribution market for propane gas in a two-

county geographic market located in southwestern Georgia. (R1-1-5). The Complaint further alleged that Petitioner Northern Propane violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a), by engaging in unlawful price discrimination. (R1-1-3). On September 4, 1985, Respondent amended his Complaint to clarify the jurisdictional basis of his Robinson-Patman Act claim. (R4-61-1).

On January 7, 1985, Petitioner Northern Propane filed its Motion for Summary Judgment. (R2-1-1). Respondent McGahee responded to the Motion for Summary Judgment by filing an extensive Memorandum of Law as well as detailed Affidavits, approximately 2,178 pages of depositions, and approximately 1,763 pages of deposition exhibits. (R3-31). Respondent subsequently filed the Affidavit of his expert witness, Dr. Bruce Seaman. (R4-58-1 and R4-64-1).

On April 13, 1987, the District Court entered an Order granting Petitioner's Motion for Summary Judgment. *McGahee v. Northern Propane Gas Co.*, 658 F.Supp 189 (N.D. Ga. 1987), Rev'd 858 F.2d 1487 (1988). (R4-71-1). Respondent McGahee appealed. On October 27, 1988, the Eleventh Circuit Court of Appeals reversed the judgment of the District Court. (Pet. 31a). Petitioner's Motion for Rehearing and Rehearing En Banc was denied on December 20, 1988 (Pet. 48a), and Petitioner filed its Petition for Writ of Certiorari on or about March 17, 1989.

B. Facts.

1. Facts Recited In Opinion of Court Below.

Most of the relevant facts are summarized in the opinion of the Court of Appeals. *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1491-92 (11th Cir. 1988). These facts were reprinted in the Petition at p. 3-6 and will not be quoted again here. However, Petitioner failed to include the Court's footnotes and substi-

tuted its own footnotes without designating them as such. *Compare* Petition, p. 3-6 and notes 1-4 *with* 858 F.2d at 1491-92 and notes 1-7. The Eleventh Circuit's footnotes are integral to an understanding of the factual basis of Respondent's claims.

In summary, the Eleventh Circuit found the record established the following facts pertinent to the instant petition: Petitioner Northern Propane operates one hundred eighty (180) propane outlets in twenty-five (25) states; and at the time it initiated the conduct about which Respondent complains, Petitioner controlled 60 percent of the total product market in the stipulated market area. Except for Respondent, Petitioner's competitors in the market area were based outside the geographic market area and their ability to compete with Petitioner was impaired because of the cost of transporting propane.

Respondent McGahee had been employed by Petitioner. He was demoted by Petitioner, and he subsequently resigned. Eventually, he organized a retail propane outlet, competing head-to-head with Petitioner in the market area. Immediately prior to Respondent opening for business, Petitioner reduced its prices for propane. A price war ensued at the time Respondent opened its doors, and continued until the complaint was filed. During the price war, Petitioner sold propane at prices below its average total cost and, in some instances, below its average variable cost. The prices charged by Petitioner in the market area were below those charged by Petitioner in other areas.

In addition to evidence regarding Petitioner's pricing, the Eleventh Circuit notes other activities by Petitioner. Petitioner obtained copies of Respondent's S.B.A. loan application and other documents related to Respondent's financial condition. Petitioner made a determination to "take the offensive" and "fight" Respondent for the market, and Petitioner established as one of its goals "to contribute to Floyd's financial problems." Petitioner adopted a policy whereby it provided free propane

tanks to its customers in the market area, while charging customers for tank rentals in other areas. This strategy focused on Respondent McGahee's limited capital, and further reduced the price of Petitioner's product. 858 F.2d 1487, 1491-92. (Pet. 1a-3a).

2. Additional Facts Necessary to an Understanding of the Issues.

In addition to the facts stated in the Court's Opinion, there was other evidence of Petitioner's anti-competitive conduct. The record shows that numerous customers who had decided to switch from Petitioner to Respondent had called Petitioner repeatedly to demand that Petitioner pick up its tanks. Plaintiff's Exhibit 78 at C00971. (R3-31). However, Petitioner delayed picking up its tanks so long that the customers would run out of propane. McDaniel Deposition, Volume IV, p. 486, 490. (R3-31). In some instances, Petitioner filled the customer's tank after being told that the customer wanted to switch companies. *Id.* at 490. In other cases, Respondent's delivery men, faced with the choice of putting Respondent's gas in Petitioner's tanks, leaving the customers without gas or replacing Petitioner's tanks, chose to replace the tanks, leaving Petitioner's tanks on the property for Petitioner to pick up at its convenience. Petitioner then reported Respondent to the State Fire Marshal for disconnecting its tanks. Petitioner further pursued its stated goal of contributing to Respondent's financial problems by filing a frivolous lawsuit against Respondent in the United States District Court for the Middle District of Georgia, and by filing an equally frivolous counterclaim in this case. Petitioner dismissed its counterclaim in this action after Respondent moved for Summary Judgment. (R1-25-1), et seq., (R2-32-1); (R2-33-1). Subsequently, United States District Judge J. Robert Elliott granted Respondent McGahee's Motion for Summary Judgment in the Middle District lawsuit, finding that Petitioner was not even the owner

of the account on which it was suing Respondent. Notwithstanding that this fact was known to Petitioner's counsel more than a year before the hearing on the Motion for Summary Judgment, Petitioner litigated the issue until the date of Judge Elliott's ruling. *See* Deposition of Ronald Ingram, Volume II at p. 139-141, 204-205; Letter from Thomas B. Metzsloff to James L. Paul, dated 12/28/84. (R1-25).

3. Misstatements of Fact by Petitioner.

The Petition contains a number of misstatements of facts which are material to the Court's consideration.

(a) Sales Below Average Variable Cost.

Petitioner has premised its entire Petition on the assertion that all of its sales of propane gas were at prices above its average variable cost. Petition, p. 7-8. However, as the Eleventh Circuit repeatedly pointed out, there was sufficient evidence in the record to create a triable issue of fact as to whether or not Petitioner sold propane gas at prices below average variable cost. 858 F.2d 1487, 1492 at n.5, 1495 at n.12 and 1504. (Pet. 4a n.5, 9a n.12 and 27a). *See, e.g.*, Plaintiff's Exhibit 79 at C00812 (R3-31); Exhibit 87 at IN01010, IN01013 and IN01037 (R3-31). Petitioner's own records show sales below average variable cost, even using the average variable costs calculated by Petitioner's own expert, which omitted costs most businesses would consider variable, such as hourly wages, customer tanks, delivery trucks, etc., *see* 858 F.2d 1495, n.12 (Pet. 9a n.12). Thus, from May 1982 through December 1982, Petitioner sold propane to its highest volume industrial accounts at a price of 60.9 cents per gallon. Gower Affidavit, Exhibit D, p. 2 (R2-27); Plaintiff's Exhibit 15 at p. C00907 (R3-31); Plaintiff's Exhibit 16 at p. C00851 (R3-31); Plaintiff's Exhibit 11, p. C00856 (R3-31); Plaintiff's Exhibit 21, p. C00852 (R3-31); Wade Deposition, Vol. III, p. 367. (R3-31). In October, November, and December 1982, Petitioner's own

expert testified that Petitioner's average variable costs exceeded 61.67 cents per gallon. Gower Affidavit, Exhibit C, p. 3, lines 26-28. (R2-27). Thus, during the latter part of 1982, Petitioner's average variable cost exceeded the price at which it was selling propane to its highest volume users.

(b) Barriers to Entry.

In its Petition, Petitioner has repeatedly misstated the facts in the record related to the issue of whether there are barriers to entry in the market. Specifically, Petitioner has repeatedly stated that there are no barriers to entry into the retail propane distribution market in Mitchell and Baker Counties, Georgia; and Petitioner relies on this fact statement in its statement of the questions presented. However, as the Eleventh Circuit noted, whether or not there are barriers to entry sufficient to allow Petitioner to garner supracompetitive profits after destroying Respondent is a question of fact for the jury. *See* 858 F.2d 1487, 1495 at n.11 and 1505 at n.44 (Pet. 9a n.11 and 28a n.44) (suggesting that existence of barriers to entry is a question of fact in this case). The record is replete with evidence from which a jury could find that there are barriers to entry in the retail propane distribution market in southwest Georgia. *See* Part III.B., *infra*. Therefore, Petitioner's repeated statements that there were no barriers to entry into the retail propane distribution market misrepresent the record and the opinion of the Court below.

(c) Injury to Competition.

Petitioner has also insinuated in its Petition that no competitors had been driven from the market by Petitioner's conduct. (Pet. at p. 6). However, Dan Holloway, another competitor of Petitioner, testified that he had been forced from the market by Petitioner's predatory pricing. *See* Holloway Affidavit, ¶ 4 (R3-31). Holloway testified that even after Petitioner's

prices rose to normal competitive levels he was unable to regain the business he had lost. *Id.* He was deterred from reentering the market by the capital costs and the concern that, if he spent the money to place tanks at customers' houses, Petitioner would again cut its prices below cost. (R3-31).

(d) Ability to Charge Supracompetitive Prices.

Finally, Petitioner has stated that it had no ability to charge supracompetitive prices, and its statement of the questions presented assumes such an inability. (Pet. (i), 4 n.1, and 27). However, as the Eleventh Circuit noted, there was evidence in the record from which a jury could find that Petitioner had the ability to charge supracompetitive prices in its other geographical districts. 858 F.2d at 1505 n.42. (Pet. 28a n.42). There was also evidence that the market was stagnant, that Petitioner had sufficient market share and excess capacity to "discipline" any competitors, and that propane gas cannot be sold profitably more than 25-30 miles from a company's storage tanks. Wade Deposition, Vol. I, p. 123 (R3-31); McGahee Affidavit ¶ 6 (R3-31); Ingram Affidavit, at ¶ 6 (R2-27-4); Seaman Affidavit. (R4-58-20). Respondent and Petitioner were the only companies located at the center of the district. The remaining competition, which was fragmented, was located at the edges of the district and therefore had higher transportation costs to service the primary area serviced by Petitioner and Respondent. These facts, plus the testimony of Respondent's expert, Dr. Bruce Seaman, were sufficient to create a triable issue of fact as to whether Petitioner, by eliminating its principal competitor from the market, would have been able to charge supracompetitive prices in the Camilla district.

C. Ruling of the District Court.

On April 13, 1987, the District Court granted Petitioner Northern Propane's Motion for Summary Judgment. *McGahee*

v. Northern Propane Gas Co., 658 F.Supp. 189 (N.D. Ga. 1987) (Pet. 45a). The District Court held that Respondent McGahee had failed to come forward with admissible evidence to support any essential element of its Sherman Act claims. 658 F.Supp. at 1986-197. (Pet. 35a and 42a). In evaluating whether or not Respondent had produced sufficient evidence to create a triable issue of fact as to Petitioner's intent to monopolize, the District Court specifically refused to consider any subjective evidence of intent. (Pet. 37a). The Court stated that it "cannot and need not divine the intent behind Defendant's pricing policy". Disregarding all subjective evidence of intent, the Court held that, as a matter of law, prices above average variable cost are *per se* legal and non-predatory. (Pet. 34a, 37a). Disregarding evidence in the record that Petitioner had in fact priced below its average variable cost, *see* Part I.C.(1) above, the District Court held as a matter of law that Respondent had failed to produce evidence from which a jury could find an attempt to monopolize, in violation of Section 2. 658 F.Supp. at 196. (Pet. 42a).

The District Court also held as a matter of law that there were no barriers to entry into the relevant market, despite record evidence to the contrary. 658 F.Supp at 195. (Pet. 40a-41a). *See* Seaman Affidavit, ¶ 24 (R4-58-20); Part III.B, pp. 14-16, *infra*.

The District Court further held as a matter of law that there was no dangerous probability that Petitioner would succeed in acquiring monopoly power, notwithstanding evidence that Petitioner held 60 percent to 65 percent of the relevant market at the time it commenced its predatory pricing scheme, and notwithstanding evidence that other competitors were driven from the market by Petitioner's conduct, and notwithstanding the testimony of Respondent's expert. (Pet. 42a-43a). *See* Plaintiff's Exhibit 87, p. IN00988, 998, 1028 (R3-31); Holloway Affidavit, at ¶ 4 (R3-31); Seaman Affidavit, ¶ 24. (R4-58).

D. Ruling of the Eleventh Circuit.

In its well-reasoned opinion, the Eleventh Circuit rejected the District Court's *per se* test which excluded subjective evidence of intent. Exhaustively reviewing the decisions of this Court and the other Courts of Appeal, as well as the legislative history of the Sherman Act, the Court found no basis for concluding that subjective evidence of intent is irrelevant in an anti-trust case, or that such evidence could be replaced by economic theory. *See* 858 F.2d at 1493-1502 and note 29. (Pet. 11a-23a and note 29). The Eleventh Circuit concluded that the legislative history of the statute required consideration of subjective, as well as objective, evidence of a defendant's intent to monopolize. (Pet. 18a).

The Eleventh Circuit analyzed the decisions of this Court and decisions from other circuits in determining the proper treatment of evidence of pricing below either average total cost or average variable cost. Contrary to Petitioner's characterization of the ruling, the Eleventh Circuit did *not* hold that predatory intent could be inferred simply from sales which were below average total cost but above average variable cost. The Eleventh Circuit specifically held that sales below average total cost but above average variable cost were merely circumstantial evidence of predatory intent; and the court held that an "inference of predatory intent, however, may not rest solely on prices of this nature." 858 F.Supp. at 1503. (Pet. 25a). The Eleventh Circuit held that in order to withstand a motion for summary judgment, a plaintiff must come forward with additional objective and/or subjective evidence of predatory intent. *Id.* The court held that sales *below* average variable cost would constitute circumstantial evidence strong enough to create a rebuttable presumption of predatory intent. *Id.* at 1504. (Pet. 26a). Again, the court held that both objective and subjective evidence are admissible to rebut or reinforce the presumption. *Id.*

Finding record evidence of sales below average total cost as well as sales below average variable cost, and finding subjective evidence of Petitioner's intent to monopolize, the Eleventh Circuit found genuine issues of fact "as to whether Northern Propane had the intent necessary for an attempt to monopolize claim." *Id.* at p. 1504-5. (Pet. 27a).

The Court of Appeals also found genuine issues of fact as to whether or not Petitioner's predatory pricing scheme had a dangerous probability of success. 858 F.2d at 1506. (Pet. 30a). The court held that Petitioner's 60 percent to 65 percent market share "is a sufficiently large platform from which such a scheme could be launched to create a genuine issue of material fact as to whether there was a dangerous probability that Northern Propane would succeed in achieving a monopoly." 858 F.2d at 1506. (Pet. 30a). The court noted that Petitioner had the apparent ability to charge supracompetitive prices in other districts, and that there was evidence that some competitors had already withdrawn from the market at issue in this case. 858 F.2d at 1505 n.42 and 1506 n.45 (Pet. 28a n.42 and 30a n.45); *See* Holloway Affidavit, ¶ 4 (R3-31). The court also noted the Affidavit testimony of Respondent's expert that there was a dangerous probability of success. *Id.* at 1506 n.45. (Pet. 30a).

The Eleventh Circuit also found questions of fact as to whether there were barriers to entry which would enable Petitioner to reap the benefits of a predatory pricing campaign through supracompetitive pricing after the elimination of Respondent. 858 F.2d at 1495, n.11 and 1505, n.44. (Pet. 9a n.11 and 28a n.44).

II. SUMMARY OF ARGUMENT.

First: The first question which Petitioner claims is presented in this case does not fairly arise from the opinion of the Eleventh Circuit; and the question is premised on facts which are actually in dispute. Contrary to the assumption implicit in

the first question presented by the Petitioner, the Eleventh Circuit did not rule that a firm with a large market share must sell above average total cost plus a reasonable profit in order to avoid an inference of predatory intent. Further, the first question is premised on a factual premise that is contradicted by record evidence that Petitioner sold below average variable cost. (*See* III.A. *infra*).

Second: The second question which Petitioner claims is presented is premised on the assumption there were no barriers to entry in the relevant market and the assumption that Petitioner had no ability to raise prices in the market. These assumptions are contradicted by the evidence identified in the Eleventh Circuit decision, and by other facts in the record. In addition, Petitioner's second question is premised on a mistaken characterization of this Court's ruling in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590 (1986). Thus, the second question Petitioner attempts to present does not fairly arise from the record in this case. (*See* III.B., *infra*).

Third: There are no real conflicts among the circuits as to the Eleventh Circuit's holding that subjective evidence of intent is properly admissible in a predatory pricing case to show predatory intent. No circuit has held, as did the District Court in this case, that subjective evidence of intent is irrelevant. The Eleventh Circuit's holding that sales between average variable cost and average total cost can be circumstantial evidence of predatory pricing which can be considered by the fact finder, is not in conflict with other circuits. Regardless of the terminology used, no circuit has held, as did the District Court in this case, that prices above average variable cost are conclusively and irrebuttably non-predatory. Finally, no circuit has affirmed a summary judgment in favor of a defendant where the record, as in the present case, shows sales below average variable cost and contains other objective and subjective evidence of predatory intent. (*See* III.C., *infra*).

Fourth: The Eleventh Circuit's holding does not conflict with any ruling of this Court. This Court has never held that subjective evidence of intent is not admissible in a predatory pricing case to show predatory intent. The Eleventh Circuit's decision that evidence of sales below average total cost can be circumstantial evidence of predatory intent is consistent with this Court's ruling in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), and is not in conflict with any decision of this Court. (*See* III.D., *infra*).

Fifth: The Eleventh Circuit's holding that the record in this case established a factual dispute as to whether or not there was a dangerous probability that Petitioner would succeed in its attempt to monopolize is not inconsistent with the rulings of other Circuits. Nor does this holding conflict with any prior rulings of this Court. (*See* III.E., *infra*).

Sixth: The Petition does not fairly present an important federal question. The Eleventh Circuit's decision reversed a summary judgment and found factual disputes to be tried. The questions posed by Petitioner assume adjudication, in Petitioner's favor, of those contested facts. The Writ should not be granted to decide legal issues which hinge on factual determinations presently in dispute. (*See* III.F., *infra*).

III. REASONS WHY THE WRIT SHOULD BE DENIED.

A. THE WRIT SHOULD BE DENIED REGARDING QUESTION NO. 1 BECAUSE QUESTION NO. 1 IS NOT PRESENTED BY THE OPINION OF THE COURT BELOW.

Petitioner contends that the first question presented is:

> Do the federal antitrust laws require a firm with a large market share to refrain from selling below its average total cost plus a reasonable profit, and subject it to the risk that a trier of fact will infer "predatory intent" if the firm

reduces prices to protect its market share and sells below average total cost, but above average variable cost?

Respondent submits the Writ of Certiorari should be denied as to this question because the question mischaracterizes the Eleventh Circuit's holding and the question is premised on factual assumptions contradicted by the record.

Nothing in the Eleventh Circuit's Decision requires a company to sell at prices "above average total cost plus a reasonable profit". The Eleventh Circuit specifically held that sales below average total cost would not, by themselves, support any inference of predatory intent. 858 F.2d at 1053 (Pet. 25a). Under the Eleventh Circuit's test, sales below average total cost, but above average variable cost, are meaningless unless there is additional evidence of predatory intent. *Id.*

The Eleventh Circuit also held that there was evidence in the record that Petitioner had sold propane gas to its largest commercial customers at prices below average variable cost. 858 F.2d at 1492 n.5, 1495 n.12, and 1504 and n.41 (Pet. 4a n.5, 9a n.12, and 27a and n.41). The Court found that this evidence, plus the other evidence in the record, created a triable issue of fact as to whether Petitioner had the intent necessary for an attempted monopolization claim. *Id.* at 1504. (Pet. 27a).

Since Question No. 1 as stated in the Petition is not fairly presented by the opinion of the Court below, and since it assumes facts which are in dispute, this Court should deny the Writ as to this question. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Accord, National Labor Relations Board v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981).

B. THE WRIT SHOULD BE DENIED REGARDING QUESTION NO. 2 BECAUSE QUESTION NO. 2 IS NOT PRESENTED BY THE OPINION BELOW.

The second question as to which Petitioner seeks the Writ of Certiorari is:

> In view of the ruling in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590 (1986), that the "prospects of attaining monopoly power [by predatory pricing] seems slight", is evidence of a large market share alone sufficient in a predatory pricing case to raise a triable issue of fact as to the existence of a "dangerous probability" of monopolization, where there are no barriers to entry, there has been a sharp decline in the Defendant's market share at the hands of a new entrant during the period of alleged predation, and Defendant does not have the power to raise prices in the market?

Respondent submits the Writ of Certiorari should be denied as to this question because the question is not presented by the Eleventh Circuit's Opinion or the record in this case.

First, the question assumes that it is undisputed that there are no barriers to entry in this case. However, as the Eleventh Circuit pointed out, there are facts in the record from which a jury could infer that there were sufficiently high barriers to entry to allow Petitioner to reap the benefits of its predatory pricing policy. 858 F.2d at 1495 n.11 and 1505 n.44 (Pet. 9a n.11 and 28a n.44). The Affidavit of H. Floyd McGahee showed the substantial capital requirements required before a single gallon of gas could be sold. McGahee Affidavit, ¶ 4. (R3-31). (Appendix, *infra*, at 18a-21a). Earl Wade, Petitioner's District Manager, testified that before a company could sell a single gallon of propane, it needed an office, office employees, bulk storage tanks,

trucks, truck drivers, and administrative personnel. Wade Affidavit, ¶ 29. (R2-27). *See also* Ingram Affidavit, at ¶ 3. (R2-27). The substantial capital requirements for opening a propane business are further documented by the testimony of Dan Holloway, the president and owner of Modern Gas Company. Holloway Affidavit, at ¶ 5. (R3-31). *See also* Taylor Affidavit, at ¶ 3. (R3-31).

The substantial capital requirements must be considered in conjunction with other factors. First, the Mitchell-Baker County retail propane market was stagnant at all times relevant to this case. The total size of the market is approximately 3,700,000 to 4,000,000 gallons of propane per year. Wade Deposition, Volume I, p. 123 (R3-31); McGahee Affidavit, at ¶ 6. (R3-31). (Appendix, *infra*, 19a). A person entering the retail propane business in this market is faced with the question of whether he can receive a reasonable return on the capital outlay of approximately $975,000 to $1,125,000 which it will cost to enter the market. Petitioner's own witnesses have testified that Petitioner expected an 18 percent return on capital per year. Ingram Affidavit, at ¶ 13. (R2-27). Respondent McGahee has testified that he considers a reasonable return on capital in the retail propane business to be at least 12 percent per annum. McGahee Affidavit, at ¶ 7. (R3-31). A new investor would need to earn net profits of at least $125,000 to $135,000 to receive a 12 percent return on an investment of $975,000 to $1,125,000. Thus, a propane dealer selling one million gallons per year, or 25 percent of this market, would need a return of about 12 cents per gallon in order to recover a 12 percent return on capital. As Respondent McGahee's Affidavit shows, it would be extremely difficult for a new entry in the Mitchell-Baker County market to achieve 25 percent penetration even in the absence of predatory pricing by Petitioner. McGahee Affidavit, at ¶ 7. (R3-31) (Appendix, *infra*, 19a-20a). It would also be extremely difficult

to recover 12 cents per gallon above all direct and indirect costs in order to receive a 12 percent return on investment. *Id.* As testified by Respondent's expert, Dr. Bruce Seaman, there are substantial barriers to entry in the Mitchell-Baker County propane market because of the large capital outlays required, the inelastic nature of the Mitchell-Baker County propane market, and the ability of the existing retail propane outlets to serve this market. Seaman Affidavit, at ¶¶ 21, 23. (R4-58-20). (Appendix, *infra*, 12a, 14a-15a).

In addition, Dr. Seaman testified in his Affidavit that the deterrent effect of a successful predatory pricing campaign, even at prices above average variable cost, together with the above factor, could substantially deter new competition from entering the market. Seaman Affidavit, at ¶ 16, ¶ 21, and ¶ 23. (R4-58). (Appendix, *infra*, 12a, 14a-15a). *See also Posner, The Chicago School of Antitrust Analysis*, 127 U. Penn. L. Rev. 925, 939-940 (1979); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213, 252-253 (1979); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977). This testimony was corroborated by the testimony of Dan Holloway, a competitor who decided not to incur the expense of returning to the market once prices rose because of concern that he would again lose customers as a result of Petitioner's prices. Holloway Affidavit, at ¶ 4. (R3-31). Based on the above, a jury could reasonably infer that substantial barriers to entry exist which would deter new competition from entering the market long enough for Petitioner to recoup the losses incurred in its predatory pricing campaign. Thus, the basic factual premise of Petitioner's second question, that there were no barriers to entry in this case, was rejected by the Eleventh Circuit and is contradicted by the record.

Second, Petitioner's second question is also premised on the factual misstatement that Petitioner does not have the

power to raise prices in the market. While it is true that Petitioner did not, prior to the institution of its predatory pricing strategy, charge supracompetitive prices in the Mitchell-Baker County market, it is equally true that Petitioner has been able to charge supracompetitive prices in other districts. 858 F.2d at 1505 n.42. (Pet. 28a n.42). There was also other evidence from which the jury could infer that Petitioner had the power to control prices. Petitioner's own documents show that it had a 60 percent to 65 percent market share and that the remainder of the market was fragmented between several smaller competitors, most of whom were located on the geographical fringes of the district and were therefore unable to compete effectively in the heart of the district because of transportation costs. Plaintiff's Exhibit 87 at p. IN00988, 998, 1028. (R3-31). It was also undisputed that Petitioner had excess capacity. *See* Petition, p. 7. The Affidavits of Dan Holloway and Floyd McGahee made it clear that Petitioner's competitors were forced either to follow Petitioner's price cuts and suffer ruinous losses or to abandon the market altogether. These facts, plus the testimony of Dr. Seaman regarding the deterrent effect of a successful predatory pricing campaign, are sufficient for a jury to conclude that Petitioner would have the power to maintain supracompetitive prices after eliminating its principal competitor. The Petitioner's second question, which assumes a contrary fact, thus does not fairly arise from the record in this case.

Third, Petitioner's second question is also premised on the irrelevant statement that Petitioner initially lost market share to Respondent. Respondent's initial ability to obtain customers is completely irrelevant to the issue of whether there was a dangerous probability that Petitioner's action, if continued, would have allowed Petitioner to acquire monopoly power. *See Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 992-93 (5th Cir. 1983), *cert. denied* 465 U.S. 1100 (1984); *Pacific Coast Agricultural*

Export Association v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), *cert. denied* 425 U.S. 959 (1976) (market share ranging from 45 percent to 70 percent sufficient to show monopoly power). Respondent's success in winning customers was attributable by Petitioner's own admissions to Respondent's experience and familiarity with his customers and their needs. See Plaintiff's Exhibit 81 at C00734 (R3-31); Wade Dep., Vol. I at p. 82. (R3-31). However, Respondent was unable to retain the customers because, unlike Petitioner, he was unable to subsidize the losses caused by below-cost pricing with supracompetitive profits earned in other geographic markets. McGahee Affidavit, ¶¶ 30-32. (R3-31). *See* 858 F.2d at 1505 n.42. (Pet. 28a, n.42).

This Court has previously held that a new entrant's success in acquiring market share from the dominant firm is irrelevant to whether or not an antitrust violation occurred. *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 702 n.14 (1967) ("the Clayton Act's proscription as to discrimination in price is not nullified merely because of a showing that the existing competition in a particular market had a major share of the sales of the product involved"). *Accord, Multiflex, Inc. v. Samuel Moore & Co., supra.*

Finally, Petitioner's second question is premised on an incorrect statement of this Court's holding in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and an incorrect statement of facts. Contrary to Petitioner's statement, this Court did not, in *Matsushita*, make a general ruling applicable to all cases regarding the viability of predatory pricing schemes. In fact, the portion of the *Matsushita* Opinion which Petitioner quotes in its second question for the proposition that "the prospects of attaining monopoly power [by predatory pricing] seems slight" actually reads as follows: "Finally, if predatory pricing *conspiracies* are generally unlikely to occur, they are especially so where, *as here*, the prospects of attaining

monopoly power seems slight." 476 U.S. 574 at 590. (emphasis added). The quoted statement is not a ruling that "the prospects of attaining monopoly power [by predatory pricing] seems slight". It is simply an observation, based on the record in that case, of the implausibility of the conspiracy allegations in that case.

The Court did, in *Matsushita*, review the academic literature regarding predatory pricing and noted the skepticism of commentators regarding the likelihood of a firm achieving monopoly power through predatory pricing. However, the Court's observation of the literature does not constitute a ruling of the Court on a matter of law. While academics may continue to debate the extent to which predatory pricing occurs under various economic models, the issue must always be determined on the basis of the facts of a specific case. This Court did not hold otherwise in *Matsushita*.

Because Petitioner's second question is premised on a mischaracterization of the holding in *Matsushita* and is premised on factual assumptions which are contradicted by the record, it does not present a proper question for review on Certiorari. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924) (issues involving disputed issues of fact not proper for certiorari); *Accord, National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981). The Court should deny the Writ of Certiorari as to the second question presented.

C. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE ELEVENTH CIRCUIT'S HOLDING CONCERNING EVIDENCE OF PREDATORY INTENT.

The Eleventh Circuit's decision to consider subjective evidence of intent and to treat sales below average total cost and

above average variable cost as circumstantial evidence of predatory intent is consistent with the rulings of other circuits. No circuit has ever held, as did the District Court in this case, that subjective evidence of intent is irrelevant and should not be considered. *See, e.g., Instructional Systems Development Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639 (10th Cir. 1987); *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied* 469 U.S. 1036 (1984); *William Inglis & Sons Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied* 459 U.S. 825 (1982); *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76, 91 n.24 (2d Cir. 1981), *cert. denied* 455 U.S. 943 (1982) (presumption can be rebutted). Nor has any circuit held that sales above average variable cost are conclusively non-predatory where there are barriers to entry and there is other evidence of predatory intent. *See, e.g. MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1113 n.40 and 1123 n.59 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 93 n.10 (3rd Cir. 1982) (declining to rule on the question).

Several circuits have treated sales above average variable cost as giving rise to a rebuttable presumption of non-predatory pricing. *See Instructional Systems Development Corp. v. Aetna Casualty and Surety Co.*, 817 F.2d 639 (10th Cir. 1987); *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987); *D. E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1437 (6th Cir. 1983), *cert. denied* 467 U.S. 1242 (1984); *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir. 1983). *Cf. Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 233 (1st Cir. 1983) (approving Ninth Circuit rule). As the Eleventh Circuit pointed out, however, the difference between the test employed in these circuits and the Eleventh Circuit test is one of semantics rather than substance. (Pet. 25a n.37). Since the plaintiff has the burden of

proof, the effect is the same whether sales above average variable cost are "rebuttably presumed" to be non-predatory or, alternatively, they are "circumstantial evidence" of predatory intent which, without other evidence of intent, mean nothing. (Pet. 25a). Under either articulation, if the plaintiff fails to come forward with additional evidence of predatory intent, the defendant will be entitled to judgment as a matter of law. (Pet. 25a and n.37).

Even the Fifth Circuit, which has come closest to adopting a purely statistical approach to predatory pricing, has pronounced its unwillingness "in an attempted monopolization case, to relegate the intent element to the status of an automatic and irrebuttable inference." *Adjusters Replace-A-Car v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 890 (5th Cir. 1984), *cert. denied* 469 U.S. 1160 (1985). The Fifth Circuit also does not regard prices above average variable cost as presumptively non-predatory where there are barriers to entry, as in this case. *See International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied* 424 U.S. 943 (1976) (average variable cost test not appropriate when there are barriers to entry). The Eleventh Circuit's ruling is, therefore, not in conflict with the decisions of other circuits.

D. THE ELEVENTH CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH DECISIONS OF THE SUPREME COURT.

No Supreme Court case has ever held that proof of pricing below average variable cost is an essential element of an attempted monopolization claim or essential to proving predatory intent. Nor has the Court ever held that circumstantial evidence of Defendant's subjective intent is irrelevant to such a claim. In fact, although this Court has recently taken notice of the debate between the circuits regarding the weight to be given

cost-based analysis in predatory pricing cases, it has expressly declined to resolve the issue. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117, n.12 (1986). The only Supreme Court case which has expressly dealt with the issue of inferring predatory intent from below-cost pricing is *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). In that case, brought under the Robinson-Patman Act, 15 U.S.C. § 13(a), the Court held that evidence of pricing below "direct cost plus an allocation for overhead", together with other evidence, was sufficient to support the jury's finding that the Defendant had violated the Robinson-Patman Act. 386 U.S. at 698-700. The Court in *Utah Pie* did not hold that a Plaintiff must establish sales below average variable cost in order to prove predatory pricing in violation of the Sherman Act. Nor did the Court hold that sales above average variable cost are *per se* legal. Rather, the clear holding of *Utah Pie* is that evidence that a Defendant's prices are below its "direct cost, plus an allocation for overhead" (i.e., average total cost), can give rise to inferences that pricing is predatory rather than competitive. The Eleventh Circuit's ruling is entirely consistent with *Utah Pie* and does not conflict with any other ruling of this Court.

E. THE ELEVENTH CIRCUIT'S RULING THAT RESPONDENT McGAHEE HAD INTRODUCED SUFFICIENT EVIDENCE FOR A JURY TO INFER A DANGEROUS PROBABILITY OF SUCCESS DOES NOT CONFLICT WITH THE HOLDINGS OF OTHER CIRCUITS.

Petitioner contends that the Eleventh Circuit's ruling is in conflict with decisions from other Circuits because it allows the jury to find a dangerous probability of success based solely on Petitioner's substantial market share at the outset of its predatory pricing scheme, without regard to the fact that Petitioner

actually lost market share to Respondent during the initial period after Respondent commenced operations. As noted above, Petitioner's argument is premised upon a mischaracterization of the Eleventh Circuit's ruling. While the Court did find Petitioner's 60 percent to 65 percent market share extremely significant, it also identified other evidence which would support a jury finding of dangerous probability of success, including: (i) evidence of barriers to entry into the market; and (ii) evidence of Petitioner's ability to charge supracompetitive prices after the competition was eliminated. 858 F.2d at 1495 n.11, 1505 n.44, 1506 n.45. (Pet. 9a n.11, 28a n.44, 30a n.45). The Court merely held that the Petitioner's large market share, on the facts of this case, was a "sufficiently large platform from which [Defendant's predatory pricing] scheme could be launched to create a genuine issue of material fact as to whether there was a dangerous probability that Northern Propane would succeed in achieving a monopoly." 858 F.2d at 1506 (Pet. 30a). *Accord, Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980 (5th Cir. 1983).

The Eleventh Circuit's opinion does not conflict with the decisions of the Seventh Circuit which are cited in Petitioner's brief. Petitioner's cite to *Indiana Grocery, Inc. v. Super Value Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989), demonstrates the fact intensive nature of decisions on issues such as "dangerous probability of success"; the citation demonstrates the reasons why the facts of the cases must be carefully analyzed in order to determine whether there is any substantial conflict in the holdings of circuits such as to justify grant of the Writ of Certiorari. The facts in *Indiana Grocery* and the Seventh Circuit's holdings respecting these facts are sufficiently different from the record and the holdings in the instant case as to eliminate any concern for a conflict between the Seventh and Eleventh Circuits on the issue of dangerous probability. First, in *Indiana Grocery*, the market share of the alleged monopolist, Kroger, was 38 percent

of the relative market in 1983, and the market share had apparently further diminished to about 35 percent of the stipulated market by 1985, when the complaint was filed (though it was 50 percent in certain submarkets). This is significantly different from the 60 to 65 percent market share of the Petitioner in this case. Second, the Court found that on the basis of facts conceded by the Plaintiff Indiana Grocery, Kroger could not control a significant percentage of the productive assets in the market. This inability to control a significant percentage of the productive assets in the market was stated as the primary reason the Plaintiff could not develop sufficient evidence to successfully oppose Kroger's motion for summary judgment on the issue of dangerous probability. In the instant case, the record demonstrates that Petitioner's facility, i.e., its physical assets and distribution system, were located in the geographic heart of the market area (Pet. 2a); McGahee Deposition, Vol. I, p. 73 (R3-31); and the record establishes that transportation costs of propane are such that only entities with facilities in the market area can successfully compete. (Pet. 2a). Until Respondent McGahee opened for business, Petitioner thus controlled virtually all of the productive assets in the market area. After Respondent McGahee began his business, Petitioner continued to control the significant portion of the productive assets in the market area, and retained substantial excess capacity. Ingram Affidavit (R2-27). Thus, the record in this case demonstrates Petitioner Northern Propane has the control of productive assets which the Seventh Circuit specifically found Kroger did not process in *Indiana Grocery*.

Likewise, in *Indiana Grocery*, the Seventh Circuit specifically rejected the parties' stipulation that there were high barriers to entry in the market area, and the Court specifically found that barriers to entry were low. By contrast, in this case, the Eleventh Circuit has specifically found, and the record demon-

strates, that there are substantial factual questions regarding barriers to entry in the instant case. 858 F.2d at 1495 n.11 and 1505 n.44. (Pet. 9a n.11 and 28a n.44). *Indiana Grocery* is simply a very different case from the instant case. The factual differences, and the holdings of the Courts respecting these factual differences, are such that the Seventh Circuit's holding in *Indiana Grocery* on the issue of dangerous probability is not in conflict with the Eleventh Circuit's holding in this case.

The Eleventh Circuit's decision is also not inconsistent with *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7th Cir. 1986), which was also cited in Petitioner's brief. In *Ball Memorial Hospital* the trial court made findings of fact after an evidentiary hearing on a motion for preliminary injunction. The district court found, as fact, that the defendant lacked sufficient market power to restrict output in the market or to raise prices. *Id.* at 1331. The court also found, as fact, a highly elastic market and an absence of barriers to entry. *Id.* at 1331-1332. The Seventh Circuit held that these factual findings by the district court were supported by the evidence and were sufficient to support the district court's conclusion that the plaintiffs were unlikely to prevail on the merits and were therefore not entitled to a preliminary injunction. *Id.* at 1340. Nothing in the *Ball Memorial Hospital* opinion conflicts with the Eleventh Circuit's ruling in this case.

The Eleventh Circuit's ruling that a jury could reasonably find from Petitioner's 60 percent to 65 percent market share that there was a dangerous probability that Petitioner would succeed in its attempt to monopolize is consistent with prior rulings of this Court. In *American Tobacco Co. v. United States*, 328 U.S. 781, 797, (1946), this Court held that the existence of monopoly power may ordinarily be inferred from a predominant share of the market. *Accord, United States v. Grinnell Corp.*, 384 U.S. 563, 571, (1966) (87 percent market share "leaves no doubt

that . . . these Defendants have monopoly power"). Petitioner argues that the Eleventh Circuit's ruling on the "dangerous probability" issue conflicts with this Court's rulings in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). However, neither *Cargill* nor *Matsushita* held that a 60 to 65 percent share of a stagnant, otherwise fragmented, market with barriers to entry could not be evidence sufficient to create a triable issue of fact as to whether there is a dangerous probability that the dominant firm will succeed in acquiring monopoly power.

F. THE PETITION DOES NOT FAIRLY PRESENT AN IMPORTANT FEDERAL QUESTION.

Respondent submits that the instant Petition for Writ of Certiorari does not fairly present an important federal question warranting the grant of Certiorari. As the Court below found, there are numerous issues of material fact in dispute, including whether or not Petitioner priced below its average variable cost, the existence of barriers to entry, and whether there was a dangerous probability that Petitioner would succeed in its attempt to monopolize. This Court long ago held that the Writ of Certiorari should not be granted on issues involving factual disputes. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924). As demonstrated above, the questions which Petitioner seeks to present to the Court are not actually presented by the opinion of the Eleventh Circuit below or by the record in this case. Because of the numerous factual issues in this dispute, the Court should deny the Writ and allow the case to proceed to a trial on the merits so that when and if the case appears again before the Court, the issues will be more properly focused and the record better developed.

IV. CONCLUSION.

For all the foregoing reasons Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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April 18, 1989

Appendix A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

H. FLOYD McGAHEE,	)	
	)	
Plaintiff,	)	CIVIL ACTION
VS.	)	FILE NO. C83-2617A
	)	
NORTHERN PROPANE	)	
GAS COMPANY,	)	
	)	
Defendant.	)	

AFFIDAVIT OF DR. BRUCE A. SEAMAN

Personally appeared before the undersigned officer authorized by law to administer oaths, Bruce A. Seaman, who having been duly sworn deposes and states as follows:

1.

I am Bruce A. Seaman, over the age of majority and suffering no disability to testify, and I make this my Affidavit of my own free will and volition, for all purposes in the above-stated civil action.

2.

I hold a Doctor of Philosophy in the field of Economics, obtained at the University of Chicago in 1978. Since 1978, I have been an Assistant and Associate Professor of Economics at Georgia State University and have in addition worked as a consultant with the Federal Trade Commission, in the area of anti-trust matters. Other details of my professional background are set forth in Exhibit C annexed hereto, consisting of three (3) pages and entitled "Curriculum Vita".

3.

Exhibit D annexed hereto consists of a list of materials which I have reviewed in order to assist me and provide factual assumptions upon which the opinions and statements made in the paragraphs which follow are in part based, and otherwise based upon my professional knowledge within the field of economics. Within the text which follows, materials considered by me in making this Affidavit are also indicated by parenthetical short-forms citation, with full citation supplied on Exhibit D annexed hereto.

4.

I have been asked by plaintiff's counsel to review and analyze, from the standpoint of current theories and techniques within economics, the Affidavit of Mr. Hugh S. Gower, (dated December 28, 1984), specifically regarding the following two issues: (1) Whether the economic analysis provided by Mr. Gower is accepted within economics as correct, most particularly whether a "price equal to average variable cost rule" is accepted as a sufficient test of preda-

tory conduct; and (2) Whether an analysis of the specific behavior of the defendant, Northern Propane Gas Co. in the Mitchell and Baker counties geographical market of the retail propane gas market from approximately March 1982 to approximately December 1983 could yield a finding, within accepted economics analysis, that Northern Propane had, in fact, engaged in predatory pricing and had in any way caused damage to competition in the relevant market.

5.

Based upon (i) a careful reading of Mr. Gower's affidavit, (ii) my knowledge of economic analysis, and (iii) the particular facts assumed by me at this time in the case from the specific sources set forth below, my conclusions as detailed in the following paragraphs are:

(a) The Areeda-Turner "average variable cost rule," relied upon by Mr. Gower, is in no way the consensus view within the economics profession. Mr. Gower's reading of the relevant literature is too narrow, and his exclusive reliance upon such a conservative standard for judging predation is too limited to adequately interpret such behavior at issue in this case.

(b) Because of the inherent limitations of the Areeda-Turner analysis of predatory behavior, Mr. Gower is led into several incomplete and misleading positions as to why Northern Propane's behavior should supposedly be viewed as a pro-competitive rather than predatory response to a new entrant. Specifically, he does not adequately demonstrate that Northern Propane's pricing was designed to increase short term profits as opposed to sacrificing such profits as part of a more dynamic, long term strategy to maintain its dominant position in the Mitchell/Baker market.

(c) A sufficient number of market characteristics and patterns of firm behavior, identified by economists as favorable to rational predatory pricing, are present in this particular case such that it is reasonable to infer (i) an intent on the part of Northern Propane to pursue a policy of predatory pricing, and (ii) a reasonable likelihood of success by Northern Propane.

6.

It is true that the Areeda-Turner analysis, and price relative to average variable cost more generally, have been given a prominent role in the economic analysis of firm behavior and of predatory conduct. However, it is now recognized by a wide variety of scholars that the Areeda-Turner rule generates a high probability that actual predatory conduct will be mislabeled as non-predatory. (See, for example, Joskow and Klevorick, "A Framework for Analyzing Predatory Pricing Policy," *The Yale Law Journal*, Vol 89, Dec. 1979, p. 238). This is due largely to its essentially static framework, which tends to understate the probability of rational predation strategy, as well as to its choice of a pricing threshold that would allow firms to meet too easily the assumed legal standard (of selling above average variable costs) while sacrificing short term profits. Numerous respected economists have published criticism of this inadequacy of the Areeda-Turner standard. (See for example, F.M. Scherer, "Predatory Pricing and the Sherman Act: A Comment," 89 *Harv. L. Rev.* 869 (1976); Oliver Williamson, "Predatory Pricing: A strategic and Welfare Analysis," 87, *Yale L.J.* 284 (1977); Joel Dirlam, "Marginal Cost Pricing Tests for Predation: Native Welfare Economics and Public Policy," *The Antitrust Bulletin*, Winter 1981;

William J. Baumol, "Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing," 89, *Yale L.J.* (1979); and A. Michael Spence, "Competition, Entry, and Antitrust Policy," in *Strategy, Predation, and Antitrust Analysis*, Federal Trade Commission, Sept. 1981). Even as conservative a legal scholar as Richard Posner has suggested a "long run marginal cost" rule in place of the Areeda-Turner short run marginal cost, or its imperfect proxy, "average variable cost" rule, pp. 184-196; "The Chicago School of Antitrust Analysis," 127, *U. of Pa L. R.* (1979), pp. 939-944.) Posner, in fact, has observed that "Any firm that sells at a price equal to its average variable costs . . . will be unprofitable. Therefore, even if the competitor is somewhat more efficient than the predator, a price equal to the predator's variable costs, and hence close to the competitor's variable costs, *should be an effective predatory price.*" (emphasis added: 127 *Univ. of Pa L.R.* (1979), p. 942). More fundamentally, Posner not only suggests an alternative pricing rule, but argues for a more thorough analysis of market conditions and strategic considerations when an alleged predator operates in more than one market. (See Paragraphs 15, 16, infra). He completely rejects the notion that a cost based test alone would be adequate to analyze predatory behavior: "There are two conventional approaches to the identification of predatory pricing, one through intent and the other through costs, and neither is adequate." (*Antitrust Law*, p. 188). Joskow and Klevorick have called for a "two tier test" combining an analysis of market conditions (entry barriers, market power considerations, profit analysis, and other factors) and a pricing test that would find a price below average *total* costs (as opposed to *variable*) predatory, unless the firm can show

that this strategy maximizes short run profits. (89 *Yale Law Journal, supra,* pp. 252-253). This approach has gained considerable recent acceptance, as recognized by the current leadership of the Federal Trade Commission. James C. Miller III and Paul Pautler note that "there are signs that the use of any simple benchmark is giving way to the use of cost-based tests in conjunction with analyses of intent, entry barriers, and structural factors that might be relevant in a full-blown rule of reason analysis." ("Predation: The Changing View in Economics and the Law," *The Journal of Law and Economics,* 28, (May, 1985), p. 497). They further note that recent decisions within the FTC apparently employ the two-tiered approach advanced by Joskow and Klevorick. (Ibid).

7.

Therefore, it is simply untrue that the Areeda-Turner test represents conventional economic wisdom. In fact, that test is widely viewed as outmoded, and prone to understate the likelihood of predatory conduct. In itself, the standard of "competitive price = average short run variable cost" is likely to allow a firm to successfully act in a predatory manner while meeting the standard, especially if there is excess capacity. In this regard, excess capacity generally yields a situation in which marginal costs are quite low (and far below long run marginal costs, as emphasized by Posner), and actually below average variable costs.

8.

Because the economic approaches presented in the articles referred to above are quite complex and some of them do not relate specifically to the case at hand, it is

useful to examine specific conclusions and theories presented by Mr. Gower's affidavit that are misleading without a more thorough analysis.

(Paragraphs 9 through 12 omitted.)

13.

Going beyond the Gower affidavit, it is possible to say more about the Northern Propane pricing scheme. A reasonable number of preconditions for rational predatory strategy exist in this case so that such intent on the part of Northern Propane and likelihood of success by Northern Propane can be reasonably inferred from the circumstances.

14.

It is widely acknowledged that an underlying premise of the Areeda-Turner price test is that predatory pricing by a dominant firm is unlikely to be a rational strategy for that firm. Several economists and legal scholars have used an essentially static analysis to correctly argue that the cost to the predator of such a strategy may be many times the cost to the competitive target. Thus, a predator must have an unusually deep reserve of financial resources (or for some reason an advantage in borrowing money in the financial markets relative to the target firm) to sustain such losses and earn the supposedly dubious right to try to raise prices later and recoup those losses while fighting off additional waves of potential entrants and fringe firms ready to expand sales into a now profitable market. (See McGee, "Predatory Price Cutting: The Standard Oil (N.J.) Case," 1 *Journal of Law and Economics* 137 (1958); L. Telser, "Cutthroat

Competition and the Long Purse, *J. Law and Econ.*, 9 (1966); and Robert Bork, *The Antitrust Paradox*, Ch. 7, pp. 144-159, Basic Books, 1978). Mr. Gower did not discuss or consider the circumstances under which a predatory pricing strategy could be rational. However, it is necessary to consider this subject in order to suggest that Northern Propane was engaging in potentially harmful predatory pricing.

15.

A threshold question that has been raised by Richard Posner (*Antitrust Law*, supra, pp. 184-185) is whether customers of a dominant firm would ever "cooperate" in a predatory pricing strategy by shortsightedly allowing a new entrant or fringe firms to expire in the face of price cuts by the aspiring monopolist. If pricing strategy of this type is ultimately designed to hurt customers in the long run, would not rational self interest induce customers to refuse to buy from the predator at such attractive short term prices? But Posner answers his own question by noting that if the number of buyers is large, or they are insufficiently informed and far-sighted to take these considerations into account, or if individual buyers decide to "free ride" by accepting the short term better price and hope that other buyers act "responsibly" to protect long term competition, such an argument for "super-buyer self protection" will not necessarily hold. In the Mitchell and Baker county market, there are a large number of buyers so that the free riding, short term argument assumes great plausibility. While McGahee had many loyal customers who would seem to want to act with this longer term perspective in mind (explained as an example of personal loyalty to him),

Plaintiff's Brief of Feb. 25, 1985 and Reply Memorandum of Plaintiff H. Floyd McGahee indicate that such loyal customers felt that they could not afford to bypass the unusually low prices offered by Northern Propane beyond some fairly small price differential. Thus, nothing in the facts presented indicates that a strategy of predatory pricing would fail because of lack of customer cooperation.

16.

Almost all commentators who have criticized the McGee, Telser, Bork, Areeda-Turner static approach to predation and consequent skepticism of the static approach about the frequency of predation, argue in some form that more dynamic, long term strategic considerations can lead to a rational strategy of predatory pricing. Such strategic considerations are especially prevalent in Williamson's work, *supra*, and in Scherer's writings, *supra*. Posner makes the point that "if, . . . a firm operates in a number of markets and faces actual or potential competitors each of whom is limited to one of its markets, it may find it worthwhile to expend considerable resources on crushing a single competitor in order to develop a reputation (for willingness to use predatory pricing) . . ." (*Antitrust Law*, supra, p. 185-186). This demonstration effect would supposedly reduce its overall costs of strategic entry deterrence even if it required the sustaining of large losses in any one market. In this context it is noteworthy that Northern Propane is a nationwide company with approximately 189 retail outlets nationwide as of 1982 (Plaintiff's Brief, Feb. 25, 1985, p. 1), while the plaintiff and the other competitors in the Mitchell and Baker market are local and operate in essentially one market area. (Ex. 79,

Document C00794, C00805). It is also noteworthy that Posner finds such strategic considerations so important that their presence reduces the need to depend on barriers to entry as a necessary condition for predatory pricing. (*U of Pa L.R.*, supra, p. 943). Thus, a strategy of predatory pricing may be rational, from Northern Propane's standpoint, because of the deterrent effect, even if the results were to impose large losses on Northern Propane in the relatively small Mitchell and Baker county market.

17.

The existence and quality of excess capacity is also an important consideration in evaluating the pricing practices of Northern Propane, or any competitor. Northern Propane argues strenuously, through the Gower affidavit, that they were operating with excess capacity and therefore were in the position that any sales that covered marginal cost (as measured by Mr. Gower as average variable cost) had to add to the firm's profitability and could not be predatory. Strictly speaking, Exhibit B, Diagram 4 suggests that merely being in a position where average total cost was not being minimized due to insufficient sales volume does not itself prove that a price that covers average variable cost is profit maximizing. The 75.2¢ price is still less than the profit maximizing price in that case. Furthermore, the excess capacity argument raises the issue of whether the cost test should be long run marginal cost rather than short run marginal cost. Posner has noted that price below long run marginal cost with intent to exclude should be an additional case of predatory pricing (price below short run marginal cost being the most basic case). (*Antitrust Law*, supra, p. 189). And a careful analysis of the IBM allegation

of predatory pricing in U.S. v. IBM (1969) notes that the appropriate marginal cost is short or long run depending on whether the firm has excess capacity. (F.M. Fisher et al. *Folded, Spindled, and Mutilated; Economic Analysis and U.S. v. IBM*, MIT Press, 1983, p. 274. Since long run marginal cost is a stricter cost test than average variable cost, the cost analysis performed by Mr. Gower is not complete because it fails to consider long run marginal costs.

18.

In light of the other factors in this case, the presence of any "excess capacity" as argued by Northern Propane, is not sufficient, in and of itself, to justify Northern Propane's price cuts in this case. This is explained in paragraphs 18 through 20. To understand fully the implications of excess capacity in relation to predatory market conduct, however, one must ask what caused such a condition. For example, the Joskow/Klevorick two-stage test (supra) includes the stipulation that pricing below short run average total cost can be considered non-predatory only if it can be shown to maximize profits. That, in turn, is likely only when substantial excess capacity exists *in the industry* (not just the dominant firm) for reasons other than strategic capacity expansion by a dominant firm (thus permitting evasion of even the most conservative marginal cost based tests). (supra, pp. 253-254).

19.

The two cases to consider in which "defensible" excess capacity could generate a profit maximizing price below average total cost would be (1) the dominant firm operates in a declining industry (for example, steel), and (2) the

entrant may have entered, at a scale sufficiently large that at a price equal to average total cost, industry capacity is underutilized as a result of new entry. (Joskow/Klevorick, supra, p. 253).

(Paragraph 20 omitted.)

21.

On the other hand, it appears that entry must occur at a fairly substantial market share in order to obtain enough sales to achieve a normal return on capital (assumed at 12%). The sale of 1,000,000 gallons a year, or 25% of the market estimated by McGahee (McGahee Affidavit), could serve as a legitimate entry barrier (scale not in absolute terms, but relative to the size of the market). However, it also suggests that once such a new firm entered, excess capacity in the industry could well exist. Four major factors mitigate against the possibility of excess capacity serving as an excuse for Northern Propane pricing below average total cost. First, to the extent that retail propane sales are highly sensitive to price, not just in response to an individual firm's price changes but to the general level of propane prices in the market, increased sales upon entry by McGahee would not have warranted such a large price reduction by Northern Propane (especially when compared to the surrounding territories; see below). Ex. 4, Document C00382 indicates that propane was highly sensitive to price. Under such circumstances it is unlikely that the immediate post entry price of the dominant firm (Northern Propane) would have imposed losses on itself, even though some price reduction would have been expected. Second, as cited above, the comparative pricing data provided at pages 52

and 56 of Plaintiff's Brief, filed Feb. 25, 1985, furnishes strong evidence that the price reductions were certainly not fully explained by any wholesale price cuts for propane (which in some instances rose rather than declined). Whether they could be explained by the possible excess capacity generated by McGahee's entry requires further analysis and data. However, the comparison to nearby, presumably competitive markets does provide a legitimate test, when properly controlled, of the difference between a long term competitive price and the short run, alleged predatory price. Such regional comparisons are commonplace and respected by economists (see Posner, *Antitrust Law*, supra, p. 66).

Third, commentary by officials of Northern Propane (cited in Plaintiff's Brief, supra) suggest clearly that McGahee was a feared and respected competitor, likely to be especially effective once he became established. Norgas officials note that McGahee had certain non-price competitive advantages that would apply once he was able to grow to a sufficient size to be more price competitive, so that then he could become an important market factor, in light of the seemingly ineffective other competitors currently in the market. This provides a pre-emptive motive for pricing very aggressively, beyond what a normal competitive response would suggest.

Fourth, the actual pricing practices become especially suspicious when the further assumption is made that the price cuts were rescinded after legal action was taken. While this might be viewed simply as a public relations move, it is just this kind of temporary pricing that led William J. Baumol (supra) to suggest a "quasi-permanence" test of predation. Under such a test, lower

prices must be maintained if the entrant leaves the market, or if the firms want to subsidize price cuts for other products. (p. 4). Similarly, Joskow and Klevorick observe that even the most seemingly innocent price cut, that of price remaining above average total cost should be subject to a "sustainability test." A price cut to a point above average total costs would be presumed legal unless reversed "fully or to a significant extent," within, say two years. (p. 255, supra). Thus, a reversal of the price cuts by Northern Propane could be viewed as supporting an inference of predation according to such tests, even if the price is not alleged to be as high as covering average total cost. Certainly, the dropping of price so as to yield a return on capital of 1.8% (Ex. 5, Document C00190) puts such pricing in a different category to that of IBM, viewed by Posner as a legal pro-competitive response to entry (IBM maintained return on sales of 20% - Posner, Antitrust Law, p. 196).

(Paragraph 22 omitted.)

23.

Finally, entry barriers into the Mitchell-Baker market, at least sufficient to significantly *delay* entry (an important point when the "returns" to a dominant firm's market power are calculated) seem to exist. In particular, the first, third, and fourth factors identified as entry barriers in H. Floyd McGahee's Reply Memorandum of April 10, page 5 (Wade Affidavit; Ingram Affidavit; Ex. 4, Document C00385; Ex. 5, Document C00190; Ex. 6, Document C00003; Holloway Affidavit; Taylor Affidavit; McGahee Affidavit), and briefly discussed above in the section on scale of entry

relative to market size, serve as economically valid and accepted considerations that can significantly delay or preclude entry. In addition, the many other firms in Georgia licensed to ship propane fuel must incur the costs of shipping, if they choose not to relocate and face the large scale entry problems of relocation. Given the costly distribution arrangements that must be made for the vast majority, about 96% of the sales, shipping in from a distance would be very non-competitive regarding price. This would provide some leverage for a dominant firm facing limited local competition to increase price.

24.

In summary, an analysis of the above assumed facts in this case to date permits the inference of predatory pricing and consumer damage, and certainly does not preclude such an inference. Furthermore, Mr. Gower's affidavit fails to substantiate the argument that a "price equal to average variable cost" test would be sufficient evidence of non-predatory conduct under the circumstances of this case.

/s/ Bruce A. Seaman
Bruce A. Seaman

Sworn to and subscribed before
me this 15th day of August, 1985.

/s/ Bonnie W. Johnson
Notary Public

Appendix B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

H. FLOYD McGAHEE,	)	
	)	
Plaintiff,	)	CIVIL ACTION
VS.	)	FILE NO. C83-2617A
	)	
NORTHERN PROPANE	)	
GAS COMPANY,	)	
	)	
Defendant.	)	

AFFIDAVIT OF H. FLOYD McGAHEE IN OPPOSITION TO DEFENDAN'S MOTION FOR SUMMARY JUDGMENT

1.

My name is H. Floyd McGahee. I am the Plaintiff in the above-captioned lawsuit. I am 56 years of age. I am not under any disability, and I am competent to make this Affidavit. I make this Affidavit on the basis of my own personal knowledge for use in opposition to a Motion for Summary Judgment which has been filed by the Defendant in this case, and for any other purpose authorized by law.

2.

On or about September, 1979, the Defendant Northern Propane Gas Company (hereinafter "Northern Propane") acquired a retail propane gas outlet located in Camilla, Georgia (hereinafter "Northern Propane Camilla Facility"). I became an employee of Northern Propane, at the time Northern Propane acquired the Northern Propane Camilla Facility. I had been employed at the retail outlet which was ultimately acquired by Northern Propane in September, 1979, for approximately 30 years. During this 30 year period, the retail propane outlet was owned by various companies, including Amoco Oil Company from whom Northern Propane purchased the retail outlet. I have been involved in the retail propane business in Mitchell and Baker County for 35 years. I am familiar with all aspects of the marketing of propane gas in the Mitchell County and Baker County market (hereinafter "Mitchell-Baker County market"). This includes all types of propane gas such as domestic gas used by households for heating and cooking, industrial and commercial gas used by industries in agricultural related companies, cylinder sales, and sales of what is called transport gas. I am familiar with the nature of the demand for all of these types of propane gas in the Mitchell-Baker County market. I am familiar with the wholesale cost of obtaining this gas, and I am familiar with the cost of operating a retail propane outlet. I am familiar with the identity and the nature of all of the various retail propane dealers who compete in the Mitchell-Baker County market, and I am familiar with the prices charged by these dealers.

3.

I am familiar with the type of machinery, equipment, and physical facilities necessary to maintain a retail propane outlet in the Mitchell-Baker County market. I am also familiar with the working capital requirements needed for the operation of such an outlet.

4.

Commencing in the late fall of 1981, and continuing through the spring of 1982, I began preparation for the opening of a retail propane outlet based in Camilla, Georgia, with the intention of serving the Mitchell-Baker County market. In obtaining the necessary machinery, equipment, storage tanks, customer tanks, office, delivery trucks and other physical assets, I sought to keep my cost to a minimum. Nevertheless, my total cost for the physical assets necessary for me to enter the retail propane business in the Mitchell-Baker County market totalled $827,000.00. In my opinion, it is not possible for any person to enter the Mitchell-Baker County market without expending at least the money I spent, that is $827,000.00, for the physical assets necessary to go into business. In addition, a person entering this market must be prepared to generate or obtain working capital in the range of $150,000.00 to $300,000.00, as the business expands. The need for this working capital is related to the operation of the business. It depends in part on the generation of accounts receivable by the retail propane outlet. It also depends on other factors such as the necessity for providing customer's tanks at the customer's locations. At the end of seven (7) months operation in December, 1982, my outstanding accounts receivable were $155,342.00.

At the end of nineteen (19) months operation in December, 1983, my outstanding accounts receivable were $274,470.00.

5.

In the Mitchell-Baker County market, most of the purchasers of propane do not own their own tanks. The large users expect to have tanks provided without cost to the user, and at the expense of the propane dealer. The smaller domestic users expect to be able to rent their tanks for fairly nominal amounts.

6.

The size of the retail propane market in the Mitchell-Baker County market area is approximately 4,000,000 gallons. By this I mean that in a normal year, my experience and information indicates that the various competitors selling retail propane in the Mitchell-Baker County market would sell a total of approximately 4,000,000 gallons.

7.

In my experience, any person or entity investing in a retail propane business, like any person investing in any other business, expects to obtain a reasonable return on the capital investment made for the purpose of going into the business. In my experience, the minimum return on invested capital which is considered reasonable in the propane business is at least 12% per annum. Many retail outlets generate much higher returns on capital investment. When I was employed by Northern Propane, each branch or district manager including myself, was given as a goal for each of the branch operations, the generation of a

return on investment of at least 18% per annum. Based on my experience, no person or entity would enter a retail propane market for the purpose of competing with existing retail outlets serving that market area, unless that person or entity could expect to receive at least a 12% per annum return on capital investment.

8.

For the reasons set out above, a person entering the retail propane business in the Mitchell-Baker County market must be prepared to expend a total of approximately $975,000.00 to $1,125,000.00 for both fixed assets and working capital. In order to receive a return of 12% per annum on this invested capital, a person would therefore expect to receive a return of approximately $120,000.00 to $135,000.00. If a new entrant to the Mitchell-Baker County market assumes he will reach sales of 1,000,000 gallons per year, the new entrant would need to recover in the range of 12¢ per gallon to 13.5¢ per gallon above all direct and indirect costs in order to receive a 12% return on investment. Based on my experience, I believe it would be extremely difficult for a new entry in the Mitchell-Baker County market to make the 25% market penetration necessary to sell 1,000,000 gallons of retail propane per year. And if a new entrant in the market is able to make a 25% market penetration and obtain sales of 1,000,000 gallons, the question of whether the new entrant is able to receive a 12¢ to 13.5¢ per gallon return above all direct and indirect costs will depend almost entirely on the price for which the propane can be sold, in relation to the wholesale cost of propane. For the foregoing reasons, I believe there are substantial economic

barriers to persons or entities entering the retail propane market in Mitchell and Baker Counties, Georgia.

9.

In addition, there are other intangible and noneconomic barriers to entry including long standing relationships between customers and various entities presently in the market.

10.

At the time I was preparing to enter the retail propane market in the very late fall of 1981 and the early part of 1982, the retail prices for propane in the Mitchell-Baker County market, were generally in the range of 78¢ to 80¢ per gallon for industrial propane and 88¢ to 90¢ per gallon for domestic propane. Green Propane, Farmer's Gas, and Modern Gas were all competing in the market area during this time; the prices of each of these entities was generally in this range. At the beginning of 1982, the prices charged by Northern Propane were approximately 75¢ for industrial gas and 80¢ for domestic gas. I had anticipated opening for business, using these prices: *i.e.*, 75¢ per gallon for industrial gas and 80¢ for domestic gas.

(Paragraphs 11 through 28 omitted.)

29.

None of the other competitors in the Mitchell-Baker County market sold domestic propane as low as the prices at which Northern Propane sold domestic propane in 1983.

30.

Because of Northern Propane's drastic price cuts in domestic gas, I was forced to sell domestic gas at prices lower than I otherwise would have been able to sell domestic gas. In addition, I lost business because I was not able to sell propane gas at prices as low as the prices at which Northern Propane was selling.

31.

If I had known in advance that Northern Propane was going to cut the prices of domestic and industrial propane as it did in the Mitchell-Baker County market in 1982, I would never have gone into the retail propane business in that market. Based on my experience it would not be reasonable to enter a retail propane market in which a competitor was pricing retail propane as Northern Propane priced that product during 1982 and 1983. This is so because if a person attempts to meet these low prices charged by Northern Propane, the person will not receive a reasonable return on the investment of approximately $1,000,000.00 required to enter the market; indeed a person charging the prices charged by Northern Propane, will operate at a loss.

32.

Northern Propane inflicted losses on me in the conduct of my business in several ways in 1982 and 1983. First, Northern Propane's reduced prices caused me to sell propane gas at prices lower than the prices which I would have otherwise sold propane gas, thus causing losses: second, Northern Propane's low prices caused me to lose business and fail to obtain business because I simply could not meet the low prices charged by Northern Propane; fi-

nally, the low prices charged by Northern Propane in conjunction with the cash discount policies and the free tank rental policy increased my working capital needs.

33.

After I filed this suit, Northern Propane's prices began to increase during 1984 and 1985. If Northern Propane had continued pricing its propane gas during 1984, and during 1985, as it did in 1982 and 1983, I may not have been able to withstand the serious losses I would have continued to suffer.

34.

Based on my 35 years experience, prices such as those charged by Northern Propane in 1982 and 1983 in the Mitchell-Baker County market are such as will exclude other competitors from the market.

FURTHER AFFIANT SAYETH NOT.

/s/ H. Floyd McGahee
H. FLOYD McGAHEE

Sworn to and subscribed before
me this 25th day of February, 1985.

/s/ Jeanne Ketchum
Notary Public

MOTION FILED
APR 19 1989

No. 88-1603

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NORTHERN PROPANE GAS COMPANY,
Petitioner,

v.

H. FLOYD MCGAHEE,
Respondent.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF THE BUSINESS ROUNDTABLE AS AMICUS CURIAE

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On Appeal from the United States Court of Appeals for the Eleventh Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Business Roundtable respectfully moves for leave to file the attached brief as amicus curiae in this case. The consent of the attorney for petitioners has been obtained, but the attorney for respondent has refused to consent.

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These substantial companies are widely dispersed by type of business and geographic location. The companies represented in The Business Roundtable are substantial producers and consumers of goods and services who believe it is critical that the marketplace operate

competitively. They are, therefore, vitally interested in interpretations of the antitrust laws that adversely affect competition.

This case involves the appropriate measure of cost and standard of proof in predatory pricing cases. Because predatory pricing claims are usually directed against firms with substantial market shares, the issues presented in this case are obviously of particular importance to large business organizations like those represented in The Business Roundtable. But those issues are also critical for a broad segment of the business community because even a relatively small company can have a significant share of sales in small markets like the one at issue here.

The brief The Business Roundtable requests permission to file describes the practical implications of the decision of the United States Court of Appeals for the Eleventh Circuit. As discussed in the attached brief, the standard established by the Eleventh Circuit decision will be virtually impossible for businesses to apply. The decision will have anticompetitive effects because it will deter businesses from engaging in vigorous price competition.

For the foregoing reasons, The Business Roundtable requests that the attached brief in support of the petition for a writ of certiorari be accepted for filing.

Respectfully submitted,

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On Appeal from the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These substantial companies are widely dispersed by type of business and geographic location. The companies represented in The Business Roundtable are substantial producers and consumers of goods and services who believe it is critical that the marketplace operate competitively. They are, therefore, vitally interested in interpretations of the antitrust laws that adversely affect competition.

This case squarely presents issues that this Court has discussed, but never decided—the appropriate measure of cost and standard of proof in predatory pricing cases.[1] The opinion of the United States Court of Appeals for the Eleventh Circuit deviates from the standard adopted by most of the other Circuits that have considered these questions. The opinion establishes a standard that will make it impossible for businesses to engage safely in vigorous price competition. It will also encourage baseless antitrust litigation by competitors who are inconvenienced by hard competition and prevent courts from resolving predatory pricing cases without trial.

Because predatory pricing claims are usually directed against firms with substantial market shares, the issues presented in this case are obviously of particular importance to large business organizations like those represented in The Business Roundtable. But these issues are also critical for a broad segment of the business community because even a relatively small company can have a significant share of sales in small markets like the one at issue here.

I. THE ELEVENTH CIRCUIT'S RULING WILL HAVE A CHILLING EFFECT ON VIGOROUS PRICE COMPETITION.

Predatory pricing is generally understood to mean a firm's efforts to eliminate existing rivals or exclude potential rivals through low prices. But because one of the goals of the antitrust laws is to insure that consumers pay low prices, it is imperative to distinguish between

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[1] In *Cargill, Inc. v. Montfort of Colorado, Inc.*, this Court wrote, "in this case, as in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, we find it unnecessary to 'consider whether recovery should *ever* be available . . . when the pricing in question is above some measure of incremental cost,' . . . or whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation." 479 U.S. 104, 117-18 n.12 (1986) (emphasis in original; citation omitted).

anticompetitive pricing behavior and desirable price competition. This Court has recognized the importance of vigorous price competition, and noted that unfounded claims of price predation present a serious threat to competition. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, for example, the Court stated:

> [C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. [475 U.S. 574, 594 (1986)].

Similarly, in *Cargill, Inc. v. Montfort of Colorado, Inc.*, this Court wrote:

> [C]ompetition for increased market share [by lowering prices to slightly above costs] is not activity forbidden by the antitrust laws. It is simply . . . vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." [479 U.S. at 116 (citation omitted)].

This brief will first explain the practical implications of the Eleventh Circuit decision and why it will seriously inhibit pro-competitive behavior.

A. Businesses Require a Clear and Objective Standard Governing Predatory Intent.

The competitive marketplace forces fast pricing decisions. A business that faces an imminent assault on its market position by an existing competitor, or a competitor about to enter the market, must react quickly. Obviously, a price cut is one strategy that needs to be considered, and even companies with very high market shares

are legally permitted to cut prices in response to competition. *See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1114 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). A company needs to be reasonably certain, however, not only that competitive pricing decisions are unlikely to result in antitrust liability, but also that they are unlikely to result in baseless, but expensive and protracted, treble-damage litigation.

Commentators and courts have generally recognized that a relatively clear, comprehensible standard is needed for several reasons.[2] In the absence of such a standard, businesses cannot be certain their pricing decisions are legal and legitimate price competition will be chilled. In addition, the absence of such a standard can encourage baseless litigation by less efficient competitors who want protection from vigorous competition. Finally, the absence of such a standard will inevitably complicate and prolong litigation because courts will be unable to dispose of predatory pricing claims without trial.

There is a widespread understanding of the burdens on public and private resources that are imposed by prolonged court proceedings, but it is also important to consider the burdens that are imposed when unduly exhaustive internal inquiries are necessary before a company can determine that a given competitive strategy is lawful. A business needs to have some guidelines, however rough cut, that will provide a safe harbor from antitrust litiga-

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[2] The cases that consider the need for an objective standard are discussed below. Many commentators also recognize the need for an objective test of predatory pricing. *See, e.g.*, III P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 711-14 (1978); R. GIVENS, ANTITRUST: AN ECONOMIC APPROACH § 3.04 (1988); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 184-96 (1976); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979).

tion, at least in all but the most extraordinary cases. If there are no guidelines that can be readily understood and quickly applied, a business may have to undertake complicated market studies and extensive file searches before it can begin to evaluate its legal position. Even if it takes such steps, it may have little confidence in the outcome. Price competition will ultimately be chilled and consumers will suffer.

As petitioners point out,[3] a majority of circuits have endorsed some form of the so-called "Areeda-Turner" test, which presumes that prices above short run marginal cost cannot be predatory.[4] Because corporate accounting data do not readily permit a determination of marginal cost, the Areeda-Turner test permits the use of short run average variable cost as a surrogate for marginal cost. The Areeda-Turner test has been widely accepted and has provided the rough guide that business people need for over a decade.

A large number of learned articles have explored the precise contours of the test and suggested variations that might yield more precise results in hypothetical cases.[5]

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[3] Petition for a Writ of Certiorari at 12-13.

[4] The test was first articulated in Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). It was further explained and slightly modified in III P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 711-22 (1978) and P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶¶ 710-21 (1988 Supp.).

[5] *See, e.g.*, R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 184-96 (1976); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 Yale L.J. 1 (1979); Hay, *The Economics of Predatory Pricing*, 51 Antitrust L.J. 361 (1982); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979); Scherer, *Predatory Pricing and the Sherman Act*, 89 Harv. L. Rev. 869 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977).

However, judges and business people seem to appreciate that ease of application is more important than absolute precision.

The Areeda-Turner test can be applied in a practical way by businesses and their legal advisors. The basic question is whether sales at the price in question will make an immediate positive contribution to bottomline results or whether they will reduce profits. Precise calculations usually are not necessary because business people are apt to have a fairly good intuitive feeling about the answer to this basic question, and they can allow a margin of error for the sake of safety in litigation. If the sales in issue will make a contribution to profits, there is no need to look further; if they will not be profitable, then a further inquiry into motivation and likely consequences of a price cut may be required.

B. Other Circuits Have Adopted a Clear and Objective Standard.

Most recent court decisions concerning predatory pricing recognize the practical realities of business decision-making and have developed a practical standard that is relatively easy for businesses and courts to apply. For example, in its recent decision in *Barry Wright Corp. v. ITT Grinnell Corp.*, the First Circuit concluded that it would rely on the Areeda-Turner test as a basis for distinguishing predatory price cutting from legitimate competition. 724 F.2d 227, 231-36 (1st Cir. 1983). Judge Breyer wrote for the majority:

> [O]ne must ask why the Sherman Act *ever* forbids price cutting. After all, lower prices help consumers. The competitive marketplace that the antitrust laws encourage and protect is characterized by firms willing and able to cut prices in order to take customers from their rivals. * * * Thus, a legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act's most basic objectives: the low price

> levels that one would find in well-functioning competitive markets. * * * [T]he antitrust courts' major task is to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting activity. [*Id.* at 231-32 (emphasis in original; citations omitted)].

Similarly, the Second Circuit has concluded that prices below reasonably anticipated marginal costs will be presumed predatory, while prices above reasonably anticipated marginal costs will be presumed non-predatory. *Northeastern Tel. Co. v. American Tel & Tel. Co.*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). The Second Circuit articulated the rationale for its adoption of the Areeda-Turner test as follows:

> [W]e must be mindful both of the limits of the judicial process and the realities of the marketplace. Court occasionally err in applying even the clearest legal rules. The more complicated that standard, the greater the chance for misapplication. * * * Predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote. [*Id.* at 88].

Accord, *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1346 (8th Cir. 1987).

Other courts have adopted some variant of the Areeda-Turner test that provides reasonably concrete guidance to both lower courts and businesses. For example, the Seventh Circuit has held that predatory pricing must be based on proof of pricing below cost:

> There is . . . . no reliable way to determine whether predatory pricing has occurred without some comparison between the prices charged and a properly defined measure of the cost of production. * * * In

> the absence of an objective standard, firms making pricing decisions in the presence of competition would be unable to ascertain what price reductions may be lawfully undertaken. [*MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d at 1112-13].

The Fifth Circuit has also adopted an objective approach and held that prices above short run average variable cost are presumptively lawful, unless there are substantial entry barriers. *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 889-91 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

The test in the Eleventh Circuit opinion, by contrast, provides no help at all.[6] The opinion below states that a jury question on predatory intent is presented whenever prices dip below "the average of the total economic cost, which includes the necessary minimum profit," and further notes that "[t]he amount of profit that is a part of total economic cost is an issue of fact requiring expert testimony particular to the market involved."[7] *Any* price response to competition would raise a potential jury issue under this test since experts may differ about the appropriate level of profit in an industry.

It is hard to imagine a test that would be more difficult for businesses to apply or that would more greatly inhibit price competition. A company with a large market share would have to maintain its traditional profit margins in the face of an intense price assault or risk

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[6] A recent decision by the Federal Circuit raises similar problems. In *U.S. Philips Corp. v. Windmere Corp.*, 861 F.2d 695 (Fed. Cir. 1988), the Federal Circuit reversed the entry of summary judgment for defendant, largely because of subjective evidence of predatory intent.

[7] Appendix A to Petition for a Writ of Certiorari at 18a & n.35.

treble antitrust damages. In fact, as Petitioners point out, this test would force a company to *raise* its prices as competitive pressures cause its volume to decline.[8] This is simply absurd.

II. THE ELEVENTH CIRCUIT SHOULD NOT HAVE RELIED ON AMBIGUOUS EVIDENCE OF PREDATORY INTENT.

Another critical flaw in the Eleventh Circuit's opinion is its reliance on subjective evidence of the defendant's intent to harm competitors by cutting prices. The Eleventh Circuit held that if prices were below average total cost (plus profit), but above short run marginal cost, the plaintiff could demonstrate predatory intent by introducing other evidence, such as documents from the defendant's files showing a desire to harm a rival.[9] Every vigorous competitor intends to harm its rivals, however, and competition stagnates when firms try to avoid doing so.

Most commentators and other courts that have considered predatory pricing claims have recognized that subjective evidence of intent is virtually useless and should not form a basis for any judicial decision. In his treatise on antitrust law, Judge Posner aptly described the problems with such evidence:

> [T]he availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality. A firm with executives sensitized to antitrust problems will not leave any documentary trail of improper intent; one whose executives lack this sensitivity will often create rich evidence of such intent simply by the clumsy choice of words to describe innocent behavior. Especially misleading here is the inveterate tendency of sales executives to brag to their superiors about their competitive prowess, often using metaphors of

[8] Petition for a Writ of Certiorari at 21-22.

[9] Appendix A to Petition for a Writ of Certiorari at 18a.

> coercion that are compelling evidence of predatory intent to the naive. Any doctrine that relies upon proof of intent is going to be applied erratically at best. [R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 189-90 (1976)].

The objective tests for predatory pricing utilized by most courts recognize this problem. Those tests also recognize that unless the defendant's price is below some appropriate measure of cost, subjective evidence of intent should be irrelevant because low prices cannot have any anticompetitive effect. *See, e.g., Henry v. Chloride, Inc.*, 809 F.2d at 1344; *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d at 232; *MCI Communications Corp. v. American Tel & Tel. Co.*, 708 F.2d at 1112; *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982).

The evidence relied on by the Eleventh Circuit vividly illustrates this problem. The court based its finding of predatory intent on evidence that the defendant had investigated the plaintiff's financial condition, provided free propane tanks to customers, and prepared documents that discussed "contribut[ing] to [the plaintiff's] financial problems." [10] This kind of evidence is totally ambiguous; it could just as easily indicate vigorous competition. But in any event, unless the defendant's pricing practices were anticompetitive by some objective standard, evidence of saber rattling rhetoric is meaningless.

The Eleventh Circuit's reliance on ambiguous evidence of subjective intent, if sustained, would further complicate the inquiry corporate counsel must make to advise on the legality of a proposed price cut. Competitive action in the marketplace usually cannot await a lengthy file search to make sure that no rhetorical excesses have been memoralized somewhere in the company's records.

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[10] Appendix A to Petition for a Writ of Certiorari at 20a.

III. THE ELEVENTH CIRCUIT MISAPPLIED THE REQUIREMENT OF A "DANGEROUS PROBABILITY OF SUCCESS".

In addition to the assurance provided by an objective cost/price test, companies that want to compete on price also gain needed assurance from the requirement that a plaintiff must prove a dangerous probability of monopoly power arising from the price cuts in issue. This means more than the prospect of inconvenience or financial injury to the plaintiff; it means a realistic chance that the defendant will emerge from a price war with a market position secure enough to recoup its losses through supracompetitive prices.

This Court and many lower courts have recognized that entry barriers should be critical to a predatory pricing case. Predatory pricing is rational business behavior only if the predator can recoup the losses sustained by charging monopoly prices after its rivals are eliminated. However, it can do so only if its monopoly prices do not attract new entry. Thus, losses incurred through predatory pricing can be recouped only if there are substantial barriers to entry. Unless such barriers exist, firms are unlikely to engage in predatory pricing because there will be no reasonable prospect of recovering the losses sustained when prices were low.

In *Matsushita*, this Court wrote, "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." 475 U.S. at 591. In *Cargill*, the Court explained this idea at greater length:

> In evaluating entry barriers in the context of a predatory-pricing claim, however, a court should focus on whether significant entry barriers would exist *after* the merged firm had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracomptitive prices, and

> the barriers that existed during competitve conditions might well prove insignificant. [479 U.S. at 120 n.15].

Accord, e.g., Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d at 889-91; *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d at 89; *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d at 724.[11]

The District Court opinion below recognized the importance of entry barriers in this case.[12] The District Court undertook a detailed analysis of barriers to entry in the market and concluded that entry was relatively easy. Indeed, the plaintiff's own success provided a powerful example of ease of entry. The plaintiff was able to enter from scratch with $800,000 of borrowed capital and capture a substantial share of the market, despite the defendant's efforts to compete on price. As a result of the plaintiff's new entry and price competition, the defendant's market share fell from 65 percent in 1981 to 35 percent in 1983.[13] There is no realistic risk that this defendant could ever exercise monopoly power and maintain its market position with supracompetitive prices when it could not even maintain its market position in the midst of a price war.

The Eleventh Circuit ignored these facts and held that there was sufficient evidence of a dangerous probability of monopolization simply because at the time the plaintiff

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[11] Most commentators agree that entry barriers are critical. *See, e.g.*, III P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 711b at 151-52; P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 711.2d at 498-99 (1988 Supp.); Hay, *The Economics of Predatory Pricing*, 51 Antitrust L.J. 361, 364 (1982); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213, 227-34, 245-49 (1979).

[12] Appendix B to Petition for a Writ of Certiorari at 32a-33a.

[13] Appendix A to Petition for a Writ of Certiorari at 22a n.45.

entered the market, the defendant had a 65 percent market share.[14] The defendant, having apparently been battered by the plaintiff in a price war, now faces the prospect of paying treble damages to the victor—all based on highly ambiguous evidence of "predatory" intent. A decision of this kind, if allowed to stand, cannot help but dampen enthusiasm for price competition by other companies in the future.

CONCLUSION

The widespread adoption of simplified rules like the Areeda-Turner test reflect a growing recognition that rules of presumptive *legality* can be just as important as rules of presumptive or *per se illegality*. *Per se* rules are important not only to expedite litigation, but also to expedite business decisions and thereby improve the operation of our competitive system. The *per se* rule against price fixing by competitors, for example, not only reduces the burden of litigation, but also makes it easier for businesses to predict the outcome of litigation and to adjust their conduct accordingly. Presumptions of legality—particularly the legality of price competition—can serve the same useful purpose. Price competition should be encouraged, not discouraged, and firms are much more likely to compete on price if they have realistic guidelines and are able to make a prompt determination that a proposed price cut will, for all practical purposes, be presumptively legal.

The decision of the Eleventh Circuit provides no useful guidelines for legal price competition. It ignores the strong policy directions of this Court and the practical standards endorsed by virtually every other court that has considered the issue. The Business Roundtable, as *amicus curiae*, urges this Court to review the Eleventh

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[14] *Id.* at 21a-22a.

Circuit decision and take this opportunity to endorse a realistic and objective standard for decision in predatory pricing cases.

Respectfully submitted,

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